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United States Supreme Court

Nos. 677 - 680

October Term, 1942.

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PETITION FOR WRIT OR WRITS OF CERTIORARI TO THE COURT OF ERRORS AND APPEALS OF NEW JERSEY, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OR WRITS OF CERTIORARI TO THE COURT OF ERRORS AND APPEALS OF NEW JERSEY.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

Presentation of Petition.

The Harborside Warehouse Company, Inc., a corporation of the State of New Jersey, respectfully presents this

Petition for a writ or writs of certiorari as the case may be, to review the final judgments of the Court of Errors and Appeals of the State of New Jersey, the highest Court of that State in which a decision in the above-entitled four cases could be had, entered November 2, 1942 (Record, pp. 619-625).

II.

Jurisdiction.

The basis upon which it is contended by Petitioner that this Honorable Court has jurisdiction to review the judgment of the Court of Errors and Appeals of New Jersey in this cause is Section 237-(b) of the Judicial Code, as amended (U. S. C. A., Title 28, Section 344-(b), in that Petitioner by the said judgment has been denied due process of law and the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States.

III.

Question Presented.

Whether under the undisputed facts Petitioner has been denied due process of law and the equal protection of the laws under the Fourteenth Amendment by the action of the State Board of Tax Appeals, which, under its own ruling, is a "Court," (*Duke Power Company* v. *Hillsborough Township,* 20 N. J. Misc. Rep. 240, 257), on appeal from the Hudson County Board of Taxation, affirmed by the Supreme Court and by the Court of Errors and Appeals, in (as Petitioner contends) disregarding the testimony presented before it by Petitioner respecting the true value of its property, which was unrefuted, ignoring settled principles of

law pertaining thereto, and determining the amount for which the property should be assessed upon a personal visit to and inspection of the property, without statutory power to do so, and without notice to Petitioner and without affording it an opportunity to cross examine the members either as to their qualifications to determine value according to the statutory test *infra,* or to ascertain whether they reached their conclusion as to value in accordance with that statutory exaction or by some other unwarranted method, or otherwise to be heard before judgment.

IV.

Brief Statement of the Case.

In order to clearly estimate the Board's action in the respect noted, it is deemed requisite to review as briefly as consonant with the somewhat voluminous record, the case as presented to the State Board, and later reviewed by the Supreme Court and finally by the Court of Errors and Appeals.

> *Harborside Warehouse Co. Inc.* v. *Jersey, City, &c.,* 19 N. J. Misc. Rep. 222, Record p. 60; 128 N. J. Law 263, Record, p. 603; 129 N. J. Law 62, Record p. 616.

V.

Statement of the Parties, and Summary of the Matter Involved.

1. The Harborside Warehouse Company (referred to herein as the "Warehouse Company"), is a corporation duly organized and existing under the laws of the State of New Jersey, and was such during the period for which the taxes were assessed and levied against it by the City of Jersey City, hereinafter referred to.

2. The City of Jersey City (referred to herein as the "City"), is a municipal corporation of the State of New Jersey, located in the County of Hudson, in said State, and was such during the periods in the preceding paragraph mentioned.

3. In the years 1935 to 1938, inclusive, the Warehouse Company was the owner of certain property located in said City, consisting of warehouse buildings, equipment and appurtenances. It did not own the land. The buildings are erected upon land leased from The Pennsylvania Railroad Company, which also operates railroad tracks, cars and other railroad equipment on parts of the tract (Record, p. 86, line 26). It had been previously leased to the Pennsylvania Dock and Warehouse Company, which had the buildings in course of construction when bankruptcy of that Company intervened (Record, pp. 143-148; 264-266; Exhibit P-2, pp. 325-408). Under that lease the buildings revert to the lessor at the expiration of the term (Record, p. 383, line 36, *et seq.*).

4. The City, through its agents, servants and officials, assessed said warehouse property, exclusive of the land, for taxation purposes for the years 1935, 1936, 1937 and 1938, respectively, as of the first day of October of each respective preceding year, in the amount of $5,137,000.00, having previously acquiesced in a reduction from $5,137,000.00 to $3,000,000.00 by the State Board for 1932 and by the County Board for 1933, and itself assessed it for $3,000,000.00 for 1934. (See Tax History, Exhibit R-1, Record p. 411.)

5. All those assessments were exclusively governed by the statute of New Jersey, Rev. Stat. 1937, Sec. 54:4-1, Sec. 54:4-23, which establishes the criterion of value. It provides as follows:

> "The assessor shall ascertain the names of the owners of all real property situate in his taxing dis-

trict, and, after examination and inquiry, determine the full and fair value of each parcel of real property situate in the taxing district at such price as, in his judgment, it would sell for at a fair and bona fide sale by private contract on October first next preceding the date on which the assessor shall complete his assessments, as hereinafter required."

And 54:4-26 provides that:

"In listing the names of owners and properties the assessor shall follow such forms and methods as may be prescribed by the state tax commissioner, who may by rule direct the assessor in a taxing district to determine the true value of each parcel of real estate assessed by him without the building and improvements and to note the same on the list, and to determine and note separately the true value of every building and other structure on each parcel, and add and carry out the result as the assessed value of the parcel, and in such case the receipt given for the payment of the tax shall contain the separate valuations." • • •

These provisions were in effect in practically the same form at the periods of the several assessments in question. (P. L. 1932, Ch. 181, p. 309.)

6. As previously stated, the Warehouse Company's buildings were assessed by the City separately from the land, the land being assessable by the State Tax Commissioner as Second Class railroad property under the Railroad Act (R. S. 54:22-1; 54:22-3; 54:23-1; 54:24-2, 7 to 11; P. L. 1941, Ch. 291, p. 773, Secs. 7, 16, 17, 19, 24).

See *Koch* v. *Jersey City*, 118 N. J. Law 85, affd. 119 Law 432.

True value, within the meaning of the tax laws, was defined by the Court of Errors and Appeals in *State Board* v. *C. R. R. Co.*, 48 N. J. Law 146, at 311, as follows:

"The third clause of the provision, that property shall be assessed for taxes according to its true value,

> excludes an assessment according to cost, number, weight, measure, fineness, or any other standard except true value—that is, the value which it has in exchange for money—"

And in *N. J. Bell Telephone Co.* v. *Camden*, 122 N. J. Law 270, at 272, the Supreme Court stated that:

> "The words 'true value' have been judicially defined to mean the price in money which a willing seller could obtain for the property from a willing buyer at a fair sale as of the assessment date under private contract."

7. In conformity with other statutory provisions (R. S. 54:3-21; 54:2-39), appeals to the Hudson County Board of Taxation were taken by the Warehouse Company from the assessments of each of said years, and the Hudson County Tax Board (referred to herein as the "County Board"), denied the City's increases of 1935, 1936 and 1937, but refused to reduce the City's assessment of 1938. Appeals from the County Board's judgments were taken to the State Board of Tax Appeals, of the State of New Jersey (referred to herein as the "State Board"), by the City, for the years 1935, 1936 and 1937, and by the Warehouse Company for the year 1938. These appeals did not come on for hearing until February 5, 1940 (Record, p. 82). The State Board ordered the assessments for each of said years to be fixed at $5,000,000 (Record, pp. 58, 73), and the Supreme Court of New Jersey, upon review by certiorari, affirmed the action of the State Board (Record, pp. 603-607). The Court of Errors and Appeals, on appeal affirmed the judgments of the Supreme Court (Record, pp. 616-625). It is to review those judgments that the present application for certiorari is made to this Honorable Court.

8. By stipulation, to avoid unnecessary repetition, the appeals were consolidated for hearing, and the testimony taken before the State Board was made applicable to the

assessments for all four of the years involved, as of the respective assessment dates (Record, pp. 83-84). The testimony thus taken was included in the State of the Case in both the New Jersey Supreme Court and the Court of Erros and Appeals, and is referred to herein as the "Record", and the Exhibit numbers mentioned are as they appear therein.

9. The record as thus consolidated was reviewed accordingly in the Supreme Court and the Court of Errors and Appeals, but separate judgments were entered for each of the four years' assessments involved (Record, pp. 603, 616).

10. Petitioner therefore prays that this Petition and the supporting Brief and Record be deemed and made applicable to each of the four captioned proceedings thus consolidated and heard and determined in the respective courts below, thereby avoiding repetitious prolixity and conserving the Court's convenience, without the necessity of filing separate petitions.

VI.

The Tax History.

Competent evidentially under *Koch* v. *Jersey City*, 118 N. J. Law 85, affd. 119 Law 432, *supra*.

10. The "Tax History" (Exhibit R-1, Record, p. 411), covering the period from 1931 to 1938, inclusive, shows that after the first year, namely, 1931, when the assessment was referred to as an "Erecting Value," the City's assessment upon the buildings in question, except for 1934, was $5,137,000.00, and that despite judgments by the State and County Boards refusing the increase and fixing the assessment at $3,000,000.00, the City has continued to establish the increase, except as noted for 1934, when it fixed this assessment at $3,000,000.00 of its own accord.

Exhibit R-1 (Record, p. 411) discloses that the State Board reduced the assessment for 1932 from $5,137,000.00 to $3,000,000.00, but it does not show how that reduction came about. The records and judgment of the State Board, however, show that that reduction was consented to by the City (Record, p. 413). The judgment was marked Exhibit R-2, *id.*, for identification,* but was excluded from evidence (Record, pp. 149-152, 412). The Petitioner respectfully submits that its exclusion was error, and that the State Board should have taken judicial notice of its own records and proceedings in this respect, as urged upon the hearing (Record, pp. 251-254).

11. For 1933 the assessment of $5,137,000.00 was renewed by the City, but the County Board reduced it to $3,000,000.00, which was in accord with the State Board's reduction of the 1932 assessment. There is no record of an appeal by the City from the County Board's reduction for 1933. In other words, the City acquiesced in that reduction.

12. For 1934 as above indicated, the City still further acquiesced by voluntarily assessing the property itself at $3,000,000.00, and, of course, took no appeal from its own assessment.

13. For 1935, 1936 and 1937, the City renewed the assessment of $5,137,000.00, and in each year the County Board reduced it to $3,000,000.00. The City's figure was repeated for 1938, which the County Board did not reduce. But there is nothing in the record to show any changed conditions or other circumstances to indicate any justification whatever for the County Board's action respecting the 1938 assessment refusing the reduction. It is clearly arbitrary.

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* Reports of U. S. Dept. of Commerce, offered at pages 186, 299, 300 of the Record, were also by duplication marked R-2, Id. (Record, pp. 414-419.)

VII.

The Evidence.

(a) The City's Case.

14. There was no competent evidence produced by the City. The only evidence presented by the City before the State Board was the testimony of two witnesses whose figures were confined to construction cost, as of the respective assessment dates, with a slight allowance for physical depreciation and obsolescence, leaving, as they termed it, a "sound value" varying from $6,100,500.00 to $7,226,800.00, according to the testimony of the City's witness Mr. Robertson (Record, p. 89, lines 27-40), and from $6,049,887.98 to $7,063,742.84, according to the City's witness Mr. Phillips (Exhibit P-1, Record, p. 112, line 1; p. 316, lines 3-6).

15. The estimate of Mr. Robertson was based entirely upon a calculation having for its foundation the cubical contents of the buildings (Record p. 90, line 20, to p. 100), —the so-called "cubical contents" method, which, at the best, is but a guess; and while the estimate of Mr. Phillips was based upon what he termed a "quantity survey" (Record, pp. 104, line 36; 120-123), founded upon the plans and specifications on file in the Building Department of the City, he had no specific knowledge of whether or not the buildings had been constructed according to those plans and specifications (Record, pp. 95, line 15; 113-114, line 20).

16. Mr. Robertson did not examine the buildings until about a year and a half prior to the Hearing, and again in December of 1939 (Record, pp. 86, line 3; 87, line 31), and Mr. Phillips did not examine them until January, 1940 (Record, p. 115, line 35). Neither witness produced sufficient data upon which an estimate could be computed even

approximating reproduction costs, neither demonstrated any reliable qualification to express a competent opinion of the reproduction cost, nor did either express an opinion as to the *true value** of the property assessed.

17. On the hearing before the State Board the City did not show any change by way of enhancement or augmentation of value which could be urged in justification of the County Board's action for 1938, or asserted to justify the State Board in sustaining the County Board's failure to reduce for that year, in the face of the full knowledge of its reductions for the previous years.

18. In view of point being made by the City regarding the non-completion of the building, it is important to note that the building was practically completed in 1931, and that between that time and May, 1934, when nothing further remained to be done, only $240,200.54 was spent for completion, a considerable portion of which was more strictly for maintenance, which becomes in a sense negligible, and would in nowise be a factor justifying the increases for which the City contends (Record, pp. 88-89; 153-158; 254-256; Exhibit P-1, p. 316, lines 3-6).

19. Neither Mr. Robertson nor Mr. Phillips stated, nor did any witness for the City state, an opinion as to the "true value" of the property assessed, or what reasonably it would sell for, as of the respective assessing dates, as between a willing seller and a willing buyer, at a fair and bona fide sale by private contract, which is the true test of value under our statute and the decisions of our Courts; nor was any consideration given by them to the elements of income or rental returns, depreciation in values due to economic depression, functional depreciation resulting from changed business conditions, the fact that at the ex-

* Italics throughout are ours unless otherwise noted, except latin phrases, and citations.

piration of the lease the buildings revert to the lessor, or any other economic factor. Cost of reproduction, less a slight allowance for depreciation and obsolescence, alone was considered (Record, pp. 90-100; 104-112; 119-123). And as stated on the record by counsel for the City, concurred in by the President of the State Board (Record, p. 99, lines 20-40; p. 100, lines 1-28), that was not for the purpose of fixing a taxation value:

> "Mr. McCarthy: Oh, no, I am not asking this man to give me figures for tax purposes. He is only here to testify to what the reproduction cost was on the various taxing dates.
>
> "President Quinn: That was my understanding of his testimony."

As early as *C. R. R. Co.* v. *State Board*, 49 N. J. Law 1, 6 (1886), Mr. Chief Justice Beasley, speaking for the Supreme Court, characterized cost of construction or reproduction as the basis of determining value, as *fallacious* and *"utterly puerile"*, and pointed out that that was only a factor that might be taken into account in determining true value, but that no one chargeable with the administration of taxation laws could be taken to have confined himself strictly to such a puerile conception of the fixing of value of property.

And, spanning the intervening years, in which many like expressions of judicial views have been voiced, it is appropriate to note that this principle has been carried over and applied by President Quinn, who presided at the hearings before the State Board, in his very recent opinion in *Schetty* v. *Jersey City*, reported in 18 N. J. Misc. Rep. 37, where, at pages 38-39 of the report, with reference to the *City's witnesses*, he said:

> "Testimony which is based exclusively upon reproduction cost, and disregards selling price, carries but little weight. *Id.* The testimony of respondent's

> witness upon valuation of improvements is, for this reason, standing alone, of little probative force, not having been adduced in support or corroboration of the opinion of the witness as to the fair sale price of the property.— * * * Nothing therein contained (*Koch* v. *Jersey City,* 118 N. J. Law, 85) affects the continued soundness of the fundamental principle that such testimony is not persuasive unless directed to the operative factor of fair sale price, whether of land or building."

Yet he ignored this principle in the instant case.

And the approval of such judicial views is expressed in the very recent case of *Atlanta B. & C. R. R. Co.* v. *United States*, 296 U. S. 33, 80 L. Ed. 25, where the United States Supreme Court, in sustaining the Interstate Commerce Commission's refusal to consider the rate-base valuation of the railroad which had been previously reported by the Commission as the value of its common stock, or to set it up on its books as an asset figure, at pages 38-39 of the Report, page 29, L. Ed., said:

> "In reaching its conclusion, it (the Commission) considered the report filed in 1923 in the valuation proceeding, and also the evidence as to the cost of reproduction, and said 'Clearly, the only pertinent value is that for purposes of sale or exchange. Cost of reproduction is to be given little, if any, weight in determining such value, in the absence of evidence that a reasonably prudent man would purchase or undertake the construction of the properties at such a figure.' Affirmed."

Such evidence of purchase and sale value *was* absent in the present case on the part of the City, but was affirmatively present in support of the taxpayer's contention of valuation, as hereinafter indicated.

20. The City, therefore, failed to produce any evidence to sustain its contention that the assessments for 1935, 1936 and 1937, as reduced by the County Board of Hudson

County, should be increased, or that the assessment for 1938, which the County Board failed to reduce, should be sustained.

It is the Petitioner's contention that the valuation as thus found by the taxing authorities now sustained by the State Board, works a denial of due process of law and of the equal protection of the laws, under the Fourteenth Amendment of the Constitution of the United States, and that the action of the State Board in the present proceedings likewise works a denial of due process of law and the equal protection of the laws under the Fourteenth Amendment, as well as being violative of the Constitution and Laws of the State of New Jersey. And it was so asserted in both the Supreme Court and the Court of Errors and Appeals.

21. The City has the burden of sustaining its contention under its appeals for 1935, 1936 and 1937, and it has failed to do so. And there is nothing in the record to sustain the assessment for 1938. The reductions granted by the County Board for 1935, 1936 and 1937 should therefore stand, and the reduction should be made in the assessment for 1938 in accordance with the contention of the Warehouse Company. A judgment must be based on evidence, or it cannot stand.

Gibbs v. *State Board*, 101 N. J. Law 371;
International Shoe Co. v. *Federal Trade Commission*, 280 U. S. 291, 299, 74 L. Ed. 431, 441.

(b) The Warehouse Company's Case.

22. Although at this juncture of the case before the State Board, a dismissal of the City's appeals as to 1935, 1936 and 1937, and the reduction sought by the Warehouse Company as to 1938, would have been justified, nevertheless in view of the State Board's attitude in this respect

as expressed in the *Colonial Life* case (18 N. J. Miss. Rep. 60, 62, 66; certiorari dismissed, 126 N. J. Law, 197), the Warehouse Company proceeded to present its testimony with regard to the assessments.

23. It was shown conclusively (and it was in nowise refuted or attempted to be refuted by the City) that from its inception the Warehouse Company has operated at a deficit, which has persisted throughout its whole history, and which has steadily mounted, despite every effort made by a capable and experienced management to overcome it. It was also shown that, due to economic factors and basic changes in the warehouse business, especially in the region where these warehouses are situate, tending materially to diminish the trend of patronage for which the project was primarily designed, the venture had proven to be an economic disappointment, and the management had been compelled to seek other avenues of patronage, but with only partial success (Record, pp. 158-165; Exhibit R-3, Record, pp. 420-459; 580, lines 30-40; 583, lines 30-40; 586, lines 30-40; 589, lines 30-40; Exhibit R-4, pp. 301, 460-577).

24. 32 percent of the total rentable area in the warehouse was unoccupied on October 1, 1938. The management was, therefore, in line with warehouses in the metropolitan area as to occupancy, based on the reports of the Department of Commerce.

25. This was also shown by independent testimony to be a general condition in the warehouse business, particularly by the evidence of George W. Duke, a warehouseman of many years' experience in Jersey City, who graphically described particularly the depleting effect of truck operations as presently conducted, constituting a myriad of floating warehouses and rendering the necessity of the stationary warehouse practically nil (Record, pp. 192-195). This is

also amplified by George Morrison, then Executive Vice President of the Warehouse Company, who also showed the effect on the cold storage features by the establishment of those facilities by the operators of plants at the sources of production, doing away in a large measure with the necessity of patronizing a terminal warehouse (Record, pp. 158-165).

26. In support of the testimony regarding general warehouse conditions in the vicinity in question, and also in and around the Port of New York, Reports of the United States Department of Commerce for the years 1934-1939, inclusive, were referred to by Mr. Morrison and were offered in evidence. The Board, however, excluded the offer. Petitioner respectfully submits that the Board erred in thus excluding the documents offered (Exhibit R-2, *id.*,* Record, pp. 186-187, 299-300, 414-419).

27. Mr. Thomas Ryer and Mr. William Stack, who are real estate men of wide experience, over a long period of time, and whose testimony is received and held in high esteem by our judicial tribunals, both testified with regard to the true value of the property involved, after taking into consideration all the various elements heretofore discussed (Record, pp. 256-261; 278, 279, 280-293; 294-298).

28. With full consideration having been given to all the elements which enter into the determination of *true value* as the basis for taxation, the valuation placed upon the property in question, as between a willing seller and a willing buyer, as of the respective assessment dates, was:

By Mr. Ryer	$3,000,000.00
	(Record, p. 280, line 15)
By Mr. Stack	3,160,000.00
	(Record, p. 297, line 26)

* Duplication of Exhibit number. See footnote, *ante*, page 8.

Those figures were based upon a tax burden of assessments in the amount of $3,000,000.00; but based upon a tax burden of the City's contended assessments, viz: $5,137,000.00, they both stated that their valuations would be modified and depreciated to the figure of $1,700,000.00, as between a willing seller and a willing buyer (Record, pp. 289-290; 298-299).

29. Earnings or lack of earnings, while not exclusively determinative of actual valuation, still are elements in determining true value, especially in relation to commercial enterprises. Yet the taxing authorities have failed or refused to effectively consider them as depreciating factors of value, and in so doing so have again denied the Warehouse Company due process of law and the equal protection of the laws in violation of the Fourteenth Amendment of the Federal Constitution, as well as denied its rights under the Constitution and Laws of the State of New Jersey.

> "The value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use."
>
> *Cleveland &c. Ry. Co.* v. *Backus*, 154 U. S. 439, 445; 38 L. Ed. 1041, 1046.

See also,

> *Borough of Bradley Beach* v. *State Board, &c.*, 124 N. J. Law 36.

30. The proofs presented by the Warehouse Company show what reasonably could have been thus obtained for the property involved, as of the respective assessment dates:

Mr. Ryer said	$3,000,000.00
Mr. Stack said	3,160,000.00

both based on a tax burden of a $3,000,000.00 assessment, and only $1,700,000.00 if based on a tax burden of $5,137,000.00.

31. The City did not even attempt to answer that proposition. The City, however, put in evidence the lease and the accompanying papers, showing the bankruptcy proceedings, which included the deed of the Selling Master in bankruptcy (Exhibit P-2, Record, pp. 144-148; 264-266; 325-408), and it is therein recited (Record, p. 340, line 23), that the consideration paid for the property was $2,100,000.00; that it was sold at public sale, on the steps of the Court House, in Jersey City on September 27, 1933; that the purchasers thereof were the highest and only bidders; and that the sale at that price was duly confirmed by the United States District Court for the District of New Jersey; and that notice of said sale was published at least once a week for four successive weeks previous to the sale in daily newspapers circulating in the County of Hudson, and in the Cities of New York and Philadelphia, and also posted in numerous public places in said County of Hudson.

32. Injecting this element in evidence by the City cannot be ignored in a fair presentation of the facts. Obviously the City is bound by the uncontroverted facts which the deed shows. On its face the deed shows that the sale took place September 27, 1933, a few days prior to the assessment date for the 1934 tax, and the deed is dated and was recorded October 24, 1933, but a comparatively few days after the assessment date for the 1934 tax (October 1, 1933); and for the year 1934, it should be borne in mind, the City placed its assessment at $3,000,000.00 doubtless having recourse to the deed and its expressed consideration, which is well known, universal routine of taxing authorities.

The bankrupt and its creditors had full knowledge and ample notice of the sale, with full opportunity to bid, or to

object to bids of others if not satisfied with them. No such bids or objections to bids appear. The mortgagee, and those for whom it was Trustee, also must have been satisfied, and the Court confirmed the sale.

Of course the taxpayer could not have introduced the deed in evidence except with the consent of the City, for the reason that a sale such as the deed evinces, would not technically have met the requirements of 54:4-23 (*ante*, p. 5), as a criterion of value; but the City having placed the deed in evidence over objection by the taxpayer, it is bound by whatever the uncontroverted facts are. Obviously the purchasers approach the class of "willing purchasers". They were not obliged or forced to purchase if they did not think it desirable. There were no competing bidders and again it is a matter of common knowledge that swarms of prospective bidders haunt the bankruptcy sales, ready and waiting to pick up bargains. Evidently, this property was not regarded as a bargain at the sale price obtained sufficient to attract other bids. The purchaser must therefore be regarded as being perfectly willing to buy.

In *Klipper* v. *City of Union City*, 55 N. J. Law Journal, 249, at 251, President Weaver stated that:

> "In the case of *State* v. *Randolph*, 25 N. J. L., p. 427, the Supreme Court determined that the amount a property would sell for at a public sale was a good *prima facie* criterion of its value. The Court quoted as authority the case of *State* v. *Danser*, 3 Zabriskie, p. 552, and *State* v. *Tunis, ibid.* 546. These cases are to the effect that the actual value of property is its price in the market."

33. This, therefore, while technically not conclusive, still is some criterion of true value, and cannot be overlooked as evidence of what the property would sell for to a prudent purchaser. And, in view of the proof, what would the "pru-

dent man'' referred to by President Quinn in the *Colonial Life Insurance* case above referred to (18 N. J. Misc. 60, 66) pay for it ''as a permanent investment''? In the light of the tax burden, increasing from $111,659.49 in 1934 (Exhibit R-3, Record, p. 420, line 18) to $151,549.70 in 1938 (*Id.*, Record, p. 446, line 21) on the assessment as reduced to the figure of $3,000,000.00 on a steadily increasing tax rate in Jersey City, plus the deficit in operation resulting from changing factors destructive of warehousing success, what *prudent man* would take the load upon his shoulders even at the $3,000,000.00 price? And when the 1939 statement is considered (*Id.*, Record, p. 453, line 20), with its tax deduction of $250,094.23 and its operating deficit of $170,445.65, where could a purchaser be found, at any price? The supporting testimony of the several witnesses produced in behalf of the Warehouse Company, will amply justify the answer, NOWHERE!

VIII.

Failure to Give Effective Consideration to the Elements of True Value.

34. The record also amply justifies the assertion of arbitrary and confiscatory action. A glance at the Tax history will show that the assessment of $5,137,000.00 was applied first in 1932. Despite the downward trend in property values ever since, and even ignoring the depreciation element allowed by the City's own witnesses, the assessment has been retained, clearly indicating no effort on the part of the assessing authorities to perform that judicial ascertainment of true value, which is the duty the law casts upon them. The amount is apparently caught out of the air with no tangible legal elements upon which to base it, and

entirely ignoring the legal elements which are judicially established as being required to be considered. It may also have been actuated by the thought expressed by counsel in the colloquy relating to the admission of the Board's judgment in the 1932 tax (Record, pp. 150, lines 35-40; 151, lines 1-16):

> "Mr. McCarthy: Just as I have said, that don't reflect anything. This company itself was in the hands of the Federal District Court in Bankruptcy.
>
> "As far as the reason why Jersey City settled it, it may have been an absolute error on the part of the person who did it.
>
> "It might have been actuated on the fact that the municipality was short of current cash.
>
> "You and I settle litigation day in and day out, because of other reasons that won't reflect the true value or reconstruction cost.
>
> "Mr. Hartpence: It might also be, by the same token, that the City finds itself short of cash and practically doubles the assessment on the property without showing any relation between true value and the assessment.
>
> "Mr. McCarthy: That is why we have appeals."

35. That there has been a complete failure to give *effective* consideration to the required legal elements in determining *true value* in making the assessment seems patent and obvious. An analysis of the Tax History and of the proofs will demonstrate that the City, in making its assessments, failed to make appropriate reductions in the face of the conditions established by the proofs, or of reductions granted by the County or State Boards in given instances, but continued to assess at unsustainable peak figures, patently arbitrarily and without any effort at judicial determination, all through the period of depreciating values, including the years now involved in these appeals.

36. That the Warehouse Company was thus denied its right under the Constitution and Laws of the State of New Jersey, to have its property taxed at its *true value*, seems self-evident, and the Warehouse Company asserts that failure to consider those elements adverted to, by any taxing authority or tribunal having jurisdiction or determination or review, is violative of its constitutional and legal rights, not only under the Constitution and Laws of the State, but also under the Fourteenth Amendment of the Constitution of the United States and the several provisions thereof.

37. The proofs show, and the Court should also judicially notice, the increase of 18.8 percent in the tax rate in Jersey City over the period 1934-1938 inclusive which together with the insistence upon excessive and unwarranted assessments, has driven the tax burden up to a point where it has become confiscatory, and renders the holding and operation of property in that municipality at an advantageous profit practically impossible, which is asserted also as a denial of due process of law within the prohibition of the Federal Constitution.

IX.

The Warehouse Company's History.

38. Construction of the Warehouse buildings, commenced in June, 1929 (Record, p. 152, lines 32-35). Of necessity, the contracts must have been made, and the construction figures fixed, long prior thereto, when "Boom" prices and "Boom" hopes still prevailed. The "great collapse" in all classes of property, struck this project full in the face at its birth, but too late to enable it to recede from its obligations. Bankruptcy for its original projec-

tors The Pennsylvania Dock and Warehouse Company, was inevitable. It soon followed, and further progress was stopped in its tracks. After the Receivership and Bankruptcy proceedings were terminated, the Harborside Warehouse Company in taking over the project was confronted with a colossal task. As stated by Mr. Morrison, the Vice President, at page 171, lines 17-19 of the Record, regarding a phase then under discussion:

> "It has taken us a lot of time to build up this rent roll with the smell of a bankruptcy around it."

Throughout the whole period of its existence there has been a general downward trend in property values, as above pointed out (Record, pp. 261, 280, 283, 284, 289, 296, 297), and the Warehouse Company has operated at a deficit, steadily mounting (Record, pp. 160, line 17; 233-235; 242-244; 248-250; 301, lines 16-20; 580, line 39; 583, line 38; 586, line 38; 589, line 39, Exhibit R-3, Record, pp. 420-459).

From an analysis of the Exhibits of the Warehouse Company it is apparent that the gross income of the Company from this property has been so low that even if all the deductions incident to the funded debt were eliminated with a resultant net income capitalized at 6%, in every year the investment value thus produced would be less than $1,150,000, and an assessment of even $3,000,000 is grossly excessive. Further, if during the years in question, the taxes had been assessed upon a basis of $2,100,000, namely, the purchase price, capitalization of the income without deduction of charges on account of funded debt would not exceed $1,900,000 even in the best year. While if the taxes were based upon an assessment of $5,137,000, and even if the funded debt charges were eliminated, the tax assessed for each year would be so great that a deficit would result. Under the latter assessment there would be no funds available for interest on bonded indebtedness. It is apparent,

therefore, that under prudent and efficient management, the situation is such that it would be difficult to secure a willing buyer who would be interested in a purchase price of even $2,100,000, much less at $3,000,000 or $5,137,000.

39. Reproduction cost is not the test of *true value* within the meaning either of the Constitution and Laws of this State or of the United States; and inasmuch as there is no competent evidence in this case in behalf of the City's assessment or to sustain its contention, it seems irrefutable that its appeals for 1935, 1936, and 1937 should have been dismissed and that the Warehouse Company's prayer for reduction of the 1938 assessment should have been granted.

X.

The City's Failure of Proof of "True Value" Contrasted with the Affirmative Proof of the Warehouse Company.

40. The increases in the assessments which the City seeks to establish and justify are clearly arbitrary, confiscatory, violative of the legal and Constitutional principles judicially asserted in protection of the taxpayer and a denial of those rights to the Warehouse Company, under both the State and Federal Constitutions, and are unsustainable in law or in fact. No proofs have been produced by the City to show that the property involved was assessed by the City at its "true value", as required by law and the Constitutions, or in accord with the standards fixed by judicial exaction. The City apparently relied solely and entirely upon the alleged cost of construction or reproduction of the buildings, less a slight allowance for depreciation. Its testimony in this respect is incompetent and shown to have no weight, and is devoid of even an expression of

its relation to true value, as legally defined, and as stated *ante*, p. 11, was disavowed as an offer for taxation for purposes. It entirely ignores the factors of earnings, general economic depression, steadily depreciating property values, continued specific functional depreciation resulting from changed and changing basic conditions in warehouse operation, causing increasing operating deficits, and other factors which the assessing authorities are bound to judicially investigate, to which they are bound to give *effective consideration*, and which no prudent prospective purchaser would overlook or fail to consider in determining what price he would willingly pay for the property in order to profitably operate it as a going business enterprise. Neither would such purchaser overlook the steadily increasing tax burden which the City's asserted exorbitant assessment, coupled with its likewise steadily increasing tax rate, imposes, persistently advancing to a point where inevitably it will become confiscatory. All these elements were taken into consideration by the witnesses for the Warehouse Company in fixing their expression of true value as between a willing buyer and a willing seller under a *bona fide* contract, which is the correct criterion under the law and the State and Federal Constitutions. And this was in nowise refuted by the City.

The State Board's disregard of the evidence and fixing the value, as an appellate tribunal, by its own inspection of the property without notice to the taxpayer or opportunity to be heard before judgment.

41. Disregarding those elements, however, the State Board, upon an inspection of the property without notice to the taxpayer (Record, p. 73, line 32), determined that the property of the Warehouse Company had a true value of $5,000,000 as of each of the assessing dates herein involved,

and the assessments were ordered fixed in said sum. A copy of the State Board's opinion and of its judgments for the four years involved, respectively, are in the Record at pages 13, 28, 42, 57, and 60 to 73.

42. It is apparent therefrom that the State Board's determination and judgments are based upon erroneous legal theories regarding the true value of the property assessed, for taxation purposes, under the tests fixed by statute and judicial decisions, in that:

(a) It disregards the tax history;

(b) It fails to give weight to the presumption in favor of the County Board's determination, as to 1935, 1936 and 1937, with no evidence to warrant a change in value for the year 1938 by the County Board;

(c) It sets up an erroneous theory of determining the value of the buildings in connection with the value of the land, not sustained by law;

(d) It ignores the evidence produced by the Warehouse Company showing the true value of the property as between a willing buyer and a willing seller, which evidence is in nowise refuted by the City;

(e) It sets up the cost of reproduction less depreciation as a basis of true value, contrary to law, and disregards the fact that the City itself did not assert such cost as being the true value of the property for taxation purposes;

(f) It bases its conclusions on statements of the evidence which are not sustained by the Record with respect to the use of the property and the business management thereof;

(g) It gives effect to the so-called book value of the property, which is not a legal criterion of true value for taxation purposes;

(h) It gives unwarranted effect to alleged common ownership of land and buildings, which does not exist and which is not a material legal factor in determining the true value of the property involved;

(i) It fixes and determines a valuation of the property greatly in excess of its true value for taxation purposes, under the evidence and the law pertaining to the same;

(j) It fails to give effective consideration to, and to apply, elements indispensable to the determination of the true value of the property in question for taxation purposes, thereby denying the Warehouse Company due process of law and equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution, as well as of the Constitution and laws of the State of New Jersey;

(k) It is based on a personal visit to an inspection of the property by the State Board without notice to Petitioner and without opportunity for cross examination or other action by Petitioner to ascertain to what extent the Board's conclusions and judgment may have been influenced by such ex parte investigation, being a further denial of due process of law in violation of the Fourteenth Amendment of the United States Constitution, as well as of the Constitution and laws of the State of New Jersey.

43. The Board of Tax Appeals held that (a) depreciated reproduction cost of the buildings should receive some weight in arriving at statutory true value of the buildings, but only in its relationship to selling or market value of the property, depending on the facts of particular cases; (b) on an appeal of the assessments on improvements alone the test is the extent to which the improvements on the land have increased the selling value of the entire parcel over the selling value of the land were it vacant, and this should

be established by showing the residual value remaining after deducting the true value of the land from the true value of the land and improvements, as a unit, the latter being established by real estate experts; and this the Board held had not been done (Record, p. 67, lines 30 *et seq.*). The effect of these holdings of the Board is to justify its giving weight to depreciated reproduction cost in the absence of competent testimony as to selling price, thus ignoring and failing to apply its own ruling, cited *supra*, and further to discard the statutory rule, which is that the full and fair value of each parcel of property is to be determined by what in the judgment of the assessing officer it would sell for at a fair and bona fide sale by private contract on the preceding October 1st, the statutory assessment date. Moreover, the rule announced by the Board, even if applicable in other cases is not applicable to the facts in this case, because:

1. The land on which the buildings are erected is not owned by the taxpayer—Harborside, and is not subject to local assessment by Jersey City. This land is held by The Pennsylvania Railroad Company under a long term lease from the owners—a matter of common knowledge,—and is land used for railroad purposes outside the main stem, and is, therefore, subject to assessment only by the State Tax Commissioner, and cannot be assessed locally by Jersey City (Record, pp. 86, line 26; 264-266; 325-408).

2. The buildings are not property used for railroad purposes, and hence are subject to local assessment by Jersey City, and cannot be assessed by the State Tax Commissioner.

3. The land thus leased by the Railroad Company,—it is not the *owner*, as stated in the Board's opinion (Record, p. 64, line 5)—is assessed to the Railroad Com-

pany by the State Tax Commissioner, and the taxes thereon, as levied and computed by the Commissioner, are paid by the Railroad Company to the State, and on the distribution required by statute such taxes are turned over to Jersey City.

44. And supplementary to the foregoing, but in no wise in limitation of the same, Petitioner avers that the said judgments of the State Board of Tax Appeals respectively are erroneous for the following reasons:

1. Failure of the Board of Tax Appeals to give proper consideration and weight to the tax history covering the period 1931 to 1938 inclusive, showing the effort of City, despite the judgments by the State and County Boards fixing the assessments at $3,000,000, and refusing increases, to establish amounts of $5,137,000, except for 1934, in which year the City of its own accord fixed the assessment at $3,000,000.

2. Refusal of the Board to admit in evidence, or to take judicial notice of the Record and judgment of the Board, showing that the City consented to the reduction in the assessment for 1932 from $5,137,000 to $3,000,000.

3. There is no record of any appeal by the City of Jersey City from the County Board's reduction of the assessment for 1933 from $5,137,000 to $3,000,000. The City apparently acquiesced in this reduction.

4. For each of the years 1935-1936-1937 the County Board reduced the assessment from $5,137,000 to $3,000,000. For 1938 the County Board did not reduce the $5,137,000 assessment made by the City in that year. There is no record of any justification for the County Board's action for 1938, which, it is claimed, was therefore arbitrary.

5. The only evidence offered by the City to sustain its assessments of $5,137,000 is the testimony of two witnesses whose figures were confined to construction costs with slight allowance for depreciation and obsolescence.

6. The estimates of reproduction costs made by these two witnesses were fallacious and lead to absurd results.

7. Failure of the City to produce any witness to testify to an opinion as to the "true value" of the property assessed, or what it would reasonably sell for as between a willing buyer and a willing seller at a fair and bona fide sale by private contract.

8. Failure of the City's witnesses to give consideration to earnings of Harborside or to depreciation in values due to economic depression or to functional depreciation due to changed business conditions.

9. Failure of the Board to give consideration and weight to the evidence showing that Harborside had operated at a steadily increasing deficit throughout its history despite efforts made by capable and experienced management to overcome it.

10. Failure of the Board to consider and give weight to the testimony of Harborside's expert witnesses who took into consideration all of the elements which enter into a determination of true value as a basis for taxes and arrived at valuations of the property under assessment on the basis of a full and fair selling price at a bona fide sale by private contract, *i. e.*, as between a willing seller and a willing buyer.

11. The Board's judgments are based upon erroneous legal theories regarding determination of the true value of the property assessed for purposes of taxation.

The Board has ignored the legal test fixed by statute and sustained in judicial decisions.

12. The consideration which the Board gave to the figure at which the buildings are carried on Harborside's Books. Such figure is not of any probative value.

13. The consideration which the Board gave to the alleged control of Harborside by the Railroad Company and the erroneous and improper inference therefrom drawn by the Board.

14. They are in divers other respects contrary to law and to the evidence adduced:

(a) The Board disregarded the presumption in favor of the Petitioner arising from the judgment of the County Board, fixing the assessment at $3,000,000 for 1935, 1936 and 1937; and there was nothing shown to justify the County Board's action in refusing to depart from that figure in 1938.

West Orange v. *Essex Board, etc.*, 18 N. J. Misc. 383 at 386;
T. & M. Co. Trac. Co. v. *Mercer Board, etc.*, 91 N. J. Law, 105 at 108;
Newton Trust Co. v. *Atwood*, 77 N. J. Law, 141 at 143;
Hackensack Water Co. v. *North Bergen*, 18 N. J. Misc. 627 at 630;
City of Hoboken v. *M. & E. R. R. Co.*, 19 N. J. Misc. 100, 101 (1941).

In the *West Orange* case, *supra*, President Quinn said:

"And, in this connection, it is unquestionable that the presumption is in favor of any action of the

County Board, • • • with a consequent burden of proof resting upon any objector to its action."

There was no testimony to warrant the Board ignoring the tax history in this respect. (Record, pp. 64, 65.)

Koch v. *Jersey City*, 118 N. J. Law 85: Affirmed 119 N. J. Law 432, *supra*.

(b) Emphasis is laid on identity of parties, viz.: Harborside Warehouse Company and the Pennsylvania Railroad Company, which are separate corporate entities (Record, p. 72, line 12). Yet President Quinn decided that that had no bearing upon the right of the taxpayer in the case of *Newark* v. *Weyerhaeuser Timber Co.*, 15 Atl. Rep. (2nd) 224.

(c) Stress was also laid upon preferential rights granted to the Pennsylvania Railroad Company (Record, p. 72, line 10).

This is erroneous; no such privilege existed. (See Record, p. 138, line 12).

(d) Book value was also stressed (Record, p. 73, line 14). But in *Hackensack Water Co.* v. *Haworth*, 19 N. J. Misc. Rep. 217 at 221:

President Quinn pointed out that it had no controlling value or effect, even where it was admitted by the taxpayer that it represented valuation for all purposes, and not peculiarly for rate-making purposes.

Valuation for rate-making purposes is not material in determining "true value" within the test prescribed for taxation.

Woodcliff Lake v. *State Board, etc.*, 14 N. J. Misc. 132; affirmed 117 N. J. Law 114;

Hackensack Water Co. v. *State Board, etc.,* 122 N. J. Law 596, at 598;
Haworth v. *State Board,* 127 N. J. Law 67, 69-70;
Universal Ins. Co. v. *State Board,* 118 N. J. Law 538, 540.

(e) The Board distinguished the *Timer* case (12 N. J. Misc. 125) and overlooked the fact that land-owner and structure-owner in the present case are not one and the same, and that the structure of the Harborside Company is specifically assessed to it by the City, while the land is owned by others and leased to the Railroad Company (Record, pp. 264-266); and hence the land and the building could not be assessed as a unit; nor could it be sold as a unit without the consent of all parties in interest, which would be an element that would detract still more from the value as between the willing purchaser and the willing seller. And it should also be noted that in the case cited in the opinion of the Board at page 71, line 16, of the Record (*Becker* v. *Little Ferry,* 125 N. J. L. 141), Mr. Justice BODINE in the opinion of the Court of Errors and Appeals (126 N. J. L. 338, at 339) points out that:

> "Buildings on leased land are usually taxable as real estate where the land on which they stand or rest is taxable."

Koch v. *Jersey City,* 118 N. J. Law, 85: Affirmed 119 N. J. Law 432, *supra.* 1937 R. S. 54:4-26, *supra.*

The lease and record title in this respect were put in evidence by the City, and they are bound by it.

(f) Nevertheless the Board laid the proof aside and visited the Harborside plant and placed its own personal

value on it (Record, p. 73, line 32), entirely different from that shown by any of the testimony.

It is not shown that they possessed any technical knowledge or experience that qualified them for such action.

Hackensack Water Co. v. *North Bergen,* 18 N. J. Misc. 627 at 630;

Long Dock Co. Assessors, 86 N. J. Law 592 at 596 to 601;

U. N. J. R. R. Co. v. *State Board,* 100 N. J. Law 131 at 136 at 137.

And without an opportunity to be heard, the taxpayer would be denied due process of law.

Kearny v. *State Board,* 4 N. J. Misc. Rep. 834, and authorities cited; affd. 103 N. J. Law 699;

Trenton &c. Trac. Co. v. *Mercer Tax Board,* 92 N. J. Law 398, 402;

Londoner v. *Denver,* 210 U. S. 373, 386; 52 L. Ed. 1103, 1112.

(g) The property must be taxed according to its present use and condition, not upon fanciful or conjectural use, and at its true value.

Mueller Co. v. *State Board,* 126 N. J. Law 141;

U. N. J. R. R. Co. v. *State Board,* 101 N. J. Law 303, 313;

State, Colwell v. *Abbott,* 42 N. J. Law 111 at 114-115;

Haworth v. *State Board,* 127 N. J. Law, 67, 69, *supra;*

Stevens Institute v. *State Board,* 105 Law 99.

(h) Mention is also made of the declination by Harborside officials to prospective applicants for space (Record, p. 72, line 15).

This was shown to have been done at the express request of the Jersey City officials. (See Record, pp. 307, lines 15-18; 310, lines 20-25; 311, lines 22-38).

XI.

In Conclusion:

44. Taking all these elements and factors into consideration, therefore, it is respectfully submitted that the increases in the assessments which the City seeks to establish and justify are clearly arbitrary, confiscatory, violative of the legal and Constitutional principles judicially asserted in protection of the taxpayer and a denial of those rights to the Warehouse Company, under both the State and Federal Constitutions, and are unsustainable in law or in fact. No proofs have been produced by the City to show that the property involved was assessed by the City at its "true value", as required by law and the Constitution, or in accord with the standards fixed by judicial exaction. The City apparently relied solely and entirely upon the alleged cost of construction or reproduction of the buildings, less a slight allowance for depreciation. Its testimony in this respect is incompetent and shown to have no weight, and is devoid of even an expression of its relation to true value, as legally defined. It entirely ignores the factors of earnings, general economic depression, steadily depreciating property values, continued specific functional depreciation resulting from changed and changing basic conditions in warehouse operation producing increasing operating deficits, and other

factors which the assessing authorities are bound to judicially investigate, to which they are bound to give *effective consideration*, and which no prudent prospective purchaser would overlook or fail to consider in determining what price he would willingly pay for the property in order to profitably operate it as a going business enterprise. Neither would such purchaser overlook the steadily increasing burden which the City's asserted exorbitant assessment, coupled with its likewise steadily increasing tax rate, imposes, persistently advancing to a point where inevitably it will become confiscatory. All these elements were taken into consideration by the witnesses for the Warehouse Company in fixing their expression of true value as between a willing buyer and a willing seller under a *bona fide* contract, which is the correct criterion under the law and the State and Federal Constitutions. And this was in nowise refuted by the City. The State Board, however, on appeal, disregarded the unrefuted testimony, ignored the settled principles of applicable law, and fixed its own arbitrary valuation of the property without notice to the taxpayer. The Supreme Court, nevertheless, sustained the State Board's action, but without a review and determination of the facts; and the Court of Errors and Appeals affirmed the Supreme Court *per curiam*.

XII.

Petitioner therefore respectfully submits that the judgments of the Court of Errors and Appeals of New Jersey, affirming the judgments of the Supreme Court, which in turn affirmed the aforesaid determination, judgments, rulings and proceedings of the State Board of Tax Appeals, should be in all things reversed, set aside and for nothing holden, and that this Honorable Court may issue its writ or writs

of certiorari to review the final judgments of said Court of Errors and Appeals, directed to said Court or to the New Jersey Supreme Court, whichever may presently be the Custodian of the record of the proceedings, to the end that the prayer of its petition may be granted, and respectfully submits herewith the Brief annexed hereto in support of its petition.

Respectfully submitted,

JOHN A. HARTPENCE,
Counsel for Petitioner.

United States Supreme Court

Nos. .....

October Term, 1942.

HARBORSIDE WAREHOUSE COMPANY, INC., a corporation, *Petitioner,* *vs.* THE CITY OF JERSEY CITY, a municipal corporation, and THE STATE BOARD OF TAX APPEALS, OF THE STATE OF NEW JERSEY.	**On Application for Writ of Certiorari.** **(1935 Tax)**
HARBORSIDE WAREHOUSE COMPANY, INC., a corporation, *Petitioner,* *vs.* THE CITY OF JERSEY CITY, a municipal corporation, and THE STATE BOARD OF TAX APPEALS, OF THE STATE OF NEW JERSEY.	**On Application for Writ of Certiorari.** **(1936 Tax)**
HARBORSIDE WAREHOUSE COMPANY, INC., a corporation, *Petitioner,* *vs.* THE CITY OF JERSEY CITY, a municipal corporation, and THE STATE BOARD OF TAX APPEALS, OF THE STATE OF NEW JERSEY.	**On Application for Writ of Certiorari.** **(1937 Tax)**
HARBORSIDE WAREHOUSE COMPANY, INC., a corporation, *Petitioner,* *vs.* THE CITY OF JERSEY CITY, a municipal corporation, and THE STATE BOARD OF TAX APPEALS, OF THE STATE OF NEW JERSEY.	**On Application for Writ of Certiorari.** **(1938 Tax)**

BRIEF IN SUPPORT OF PETITION FOR WRIT OR WRITS OF CERTIORARI.

I.

Opinions Below.

The opinion of the New Jersey State Board of Tax Appeals is reported under the title of *Harborside Ware-*

house Co. Inc. v. *Jersey City, &c.*, in 19 N. J. Misc. Rep. page 222, and is printed in the Record herein at page 60. The opinion of the New Jersey Supreme Court is reported under the same title in 128 N. J. Law, page 263, and is printed in the Record at page 603. The opinion of the Court of Errors and Appeals is reported under the same title in 129 N. J. Law, page 62, and is printed in the Record at page 616.

II.

Basis of Jurisdiction.

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended (U. S. C. A., Title 28, Section 344(b), in that Petitioner by the judgment of the New Jersey State Board of Tax Appeals, affirmed by the New Jersey Supreme Court, and affirmed by the New Jersey Court of Errrors and Appeals, has been denied due process of law and the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States.

III.

Statement of the Case.

A Statement of the Case is given under the several headings set forth in the Petition presented herewith at pages 3-36, *ante*, and in the interest of brevity it is not repeated here, but is referred to and incorporated herein as though set forth at length.

IV.

Specification of Errors.

A specification of the errors intended to be argued has been given in the accompanying Petition under the heading "Question Presented" (*ante*, p. 2), and again in the interest of brevity is not repeated here, but is referred to and incorporated herein as though set forth at length.

V.

Argument.

Petitioner was entitled to notice of the asserted action of the State Board of Tax Appeals in making a Personal Visit to the property of Petitioner, with an opportunity to be heard regarding its action, its qualifications and its method of determining value.

The facts involved; the status and effect of the evidence; the State Board's disregard of the facts, the evidence, and the applicable law; and the arbitrary fixing of a valuation of the taxpayer's property upon a personal visit to the property without notice to the taxpayer or an opportunity to be heard, are so fully stated in the Petition that a repetition of them here seems unwarranted.

And that the action of the State Board is utterly violative of the fundamental principles of due process and equal protection, seems also so patent and obvious that extensive argument and citation of authorities is not requisite.

Those fundamental principles have been recognized and asserted by judicial decisions in this Court and in the New Jersey Courts on numerous occasions. A few excerpts may not be inappropriate.

In *State Tims, et al.* v. *Newark,* 25 N. J. Law 399, at pages 425-427 (1856), it was stated by Mr. Justice RYERSON, speaking for the Supreme Court, that:

> "Another reason assigned for setting aside these proceedings is also, in my opinion, well founded, *viz.*, that no notice of any of them was given to the prosecutors; that in effect the first notice was the execution. It is admitted that the act does not in its terms require notice, that none was in fact given, and that the prosecutors have not appeared in any stage of the proceedings, except here, either in person or by counsel.
>
> "It is contended that this proceeding is an exercise of the taxing power under the authority of the legislature, that the act does not require notice, and that consequently none is necessary. Conceding this, it does not follow that the legislature can tax arbitrarily, and without giving an opportunity of being heard. The practice is the other way; all our tax laws require notice, and provide a tribunal to hear and determine. But this is not the precise question before us. Here the legislature have constituted a special tribunal, the common council and the commissioners. So far as relates to the passage of the resolutions authorizing the construction of the sewer, they act in their legislative capacity; but so far as regards how much of the expense is to be borne by the city, and how much by individuals, and how much each owner is to bear, they act judicially.
>
> "It is true the act does not require notice of any of these proceedings, but the law presumes, that, so far as their proceedings are in their nature judicial, the legislature intended it. That the legislature would not organize a special judicial tribunal to ascertain if any and how much of the property of individuals should be taken for a public improvement, and require them to proceed to condemnation without hearing the persons to be affected, the presumption would be, in the absence of all directions in the statute, that the legislature intended that the tribunal should require reasonable notice.

"It is a well settled principle, and laying at the foundation of the administration of justice, that no one is to be condemned in person or estate without an opportunity of presenting his case, and that, too, under a statutory proceeding which is silent upon the question of notice. 2 Harr. R. 399, *New Jersey Turnpike* v. *Hall;* 2 Green 520, *Youngs* v. *Overseers of Hardiston;* 14 Mass. 222, *Chase* v. *Hathaway;* 15 Johns. R. 538, *Kinderhook* v. *Claw;* 8 Vermont 389, *Corliss* v. *Corliss,* 6 Johns. R. 281, *Rathbun* v. *Miller;* 15 Wend. 374, *Owners* v. *Mayor of Albany.*"

In *Long Dock Company* v. *State Board of Assessors,* 86 N. J. Law 592, at pages 600-601 (1914), Mr. Justice SWAYZE, speaking for the Court of Errors and Appeals, said:

"* * * While the state board are neither jurors nor judges, the importance of the comparison lies in the fact that the rule applied since 1650 to jurors, and perhaps for an even longer time to judges, illustrates the fundamental principle that a hearing in order to comply with the law, must be a hearing at which adverse witnesses may be met and cross-examined. Our law is careful to secure, as Blackstone says, that evidence of facts shall be given publicly in court. The right to cross-examine witnesses as to facts is of the very essence of civilized judicial procedure, and there is no rule exempting from cross-examination witnesses who happen to be jurors also. Even judges are not exempt. *Wigm., supra.* One of the reasons given for exempting judges from the obligations of witnesses in ther own courts is the difficulty of their presiding at their own cross-examination. This difficulty is not insuperable. If it were, the courts would be subject to the mocking question of Henry the Fourth to one of his judges as to the procedure if the judge were the sole witness of a murder. The legislature has power to provide for the taking of testimony of witnesses who happen also to be members of the tribunal. It has necessarily done so in this case by making the knowledge of

members of the board evidential, and providing for a review by the court of the amount of the tax and the excessiveness or insufficiency of the assessment.* There can be no such review unless all the facts before the board are presented to the court. The legislature has taken pains also to provide for a hearing, for process of subpoena and for the examination of witnesses. *Comp. Stat., p. 5270, pl. 456.* A hearing must be a real, not a sham, hearing. *Central of Georgia Railway* v. *Wright,* 207 U. S. 127; *Londoner* v. *Denver,* 210 Id. 373; *Interstate Commerce Com.* v. *Louisville and N. R. Co.,* 227 Id. 88; *Erie Railroad Co.* v. *Paterson,* 79 N. J. L. 512. Even in a tax case, said the court in Londoner v. Denver, a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument, however brief, and, if need be, by proof, however, informal. In order to determine whether there is need of proof on his part, the taxpayer must know what he has to meet. It is not consistent with the methods of judicial tribunals nor of special tribunals seeking to do justice, to give the taxpayer no chance to know what the case made against him may be. In this case, the members must have stated to each other in secret session their knowledge of the value of this property unless they merely added the twenty per cent. in an arbitrary way—a procedure we cannot impute to them. Such a statement of the individual knowledge of each differs in no essential respect from testimony as to other facts except in its secrecy, in its lacking the sanction of an oath, and its freedom from the safeguard of cross-examination. So open to abuse is such a method, so lacking in the ordinary requirements of a hearing, that we may safely say that no man's property is safe from confiscation if taxing boards can without evidence and behind closed doors add twenty per cent. to a valuation on which sworn experts on both sides are in

* This power is not vested in the present State Board of Tax Appeals, as pointed out *infra,* at pages 61, *et seq.*

substantial agreement. If twenty per cent. can be added in this way, a thousand per cent. can be added, and the redress through the open public methods of a judicial tribunal which the legislature has been careful to provide becomes a mere delusion and the legislative intent is frustrated. We cannot sanction acts of a mere administrative board which run counter to the legislative will as expressed in the very statute from which the board derives its powers. If we did, those acts might be treated by the federal courts as a violation by the state itself of the provisions of the fourteenth amendment. *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20; *Home Tel. and Tel. Co.* v. *Los Angeles*, 227 Id. 278. The observance by the state of its obligations under the federal constitution is in the keeping of the legislature and the courts, not in that of its administrative boards."

In *Trenton and Mercer County Traction Corp.* v. *Mercer Co. Board of Taxation, et al.*, 92 N. J. Law 398, at pages 400-401 (1918), Mr. Justice SWAYZE, speaking for the Court of Errors and Appeals, said:

"There is, however, a difficulty that goes deeper. An important portion of the evidence on which the Supreme Court relied as sustaining the action of the county board was not before that board. The situation was this: Various estimates of expert witnesses were before the county board. None was adopted or followed. The board took a valuation of its own expert and added twenty per cent. indifferently to real and personal property, to personal property like rails and wires and apparatus which was subject to rapid depreciation by wear, as well as to land, the value of which was a site value and not subject to depreciation by wear, and added the same percentage to property in the populous city of Trenton and in suburban and agricultural communities. This uniformity of percentage challenges attention to any evidence in its support, and we find none. The only evidence to sustain the addition of twenty per cent,

is found in the testimony of members of the county board of taxation, taken for the first time in the Supreme Court under a rule to take depositions obtained by the prosecutor of the *certiorari*. Such evidence cannot sustain a finding that antedates the evidence. That evidence was necessary in the very point decided in *Long Dock Co.* v. *State Board of Assessors*, 86 N. J. L. 592. Although we may assume that the members of the county board would have testified to the same opinion of value if they had offered themselves as witnesses before the board, this does not suffice. The reasons why it does not suffice are stated in the opinion of the case cited. The importance of requiring the same safeguards as to evidence given by members of the board as by other witnesses, is well shown by the evidence of one member of the board in the present case, and it was stipulated that the testimony of the other members of the board, if they had been sworn, would be substantially the same. On examination by counsel for the board and the other defendants, this witness testified that he was not an expert in the valuation of railroad property in any way himself and was obliged to rely upon the evidence produced in this case as to value.

"The Supreme Court was clearly in error in saying that this testimony 'was admitted and treated with all the formal requirements, and subject to all the scrutiny and criticism that characterize opinion evidence in a formal litigation *inter partes* at law or in equity.' The difficulty with the testimony was that it was mere opinion coming from witnesses who confessedly knew nothing about the subject of their testimony. The requirement of special knowledge of his subject before a witness can express a mere opinion, is a substantial rather than a formal requirement. Such evidence if subjected to the scrutiny and criticism that characterize opinion evidence in a formal litigation at law or in equity would be rejected. It must for the same reason be rejected here. Without it, there is no evidence sustaining some three hundred thousand dollars increased valuation."

In *Town of Kearny* v. *State Board of Taxes, etc.*, 4 N. J. Misc. page 834 (1926), the Supreme Court, *per curiam*, stated that:

> " * * * The decision of the state board is attacked on the ground, that it is not supported by any legal evidence and, in support of that contention, the prosecutor cites the testimony of the president of the board (at page 281 of the record), viz.: 'That the board felt justified to some extent in ignoring the testimony of the experts on both sides, and taking the judgment of its own trained appraiser.' The board adopted *in toto* an appraisal of $2,657,628 made by Mr. Frank O'Connor, the clerk and field secretary of the board. No opportunity was given the prosecutor to examine it, rebut it, or cross-examine upon it before it was adopted as the judgment of the state board. This is not the kind of a hearing that is required in a judicial procedure. The hearing must be a real, not a sham, hearing; the parties have a right to support their allegations, if need be by proof, to determine whether there is need of proof the parties must know what they are to meet. *Long Dock Co.* v. *State Board*, 86 N. J. L. 592.
>
> "Such a procedure as is shown by this record, is not due process of law. *Trenton &c., Traction Co.* v. *Mercer County Tax Board*, 92 N. J. L. 398, 402. The judgment to be sustained must be based upon evidence. Gibbs v. State Board of Taxes and Assessment, 3 N. J. Adv. R. 986.
>
> "For these reasons the judgment of the state board of taxes and assessment in this case is reversed and set aside."

In *United New Jersey Railroad &c. Co.* v. *State Board of Taxes &c.*, 100 N. J. Law 131, at pages 136-138 (1924), Mr. Justice Black, speaking for the Court of Errors and Appeals, said:

> "The courts cannot ignore the plain mandate of the statute, for, as was said, in the case of *Douglass* v. *Board of Chosen Freeholders*, 38 N. J. L. 216, it is

no province of the courts to supervise legislation. The record in this case is an apt illustration of the wisdom of the legislature in inserting such a provision in the statute. The conclusions of this board fixing valuations should not be set aside, except for palpable error, to use the words of Chief Justice Beasley. So, this court has said, in this class of cases, where the Supreme Court dealt with the weight of evidence on the question of valuation, it properly required that the evidence should preponderate against the valuation of the state board before it would be set aside. It is well recognised, and on the plainest principles of justice, that the judgment, even of a court, is legally erroneous, if there is no evidence to support it, since without evidence its judgment is no better than an arbitrary edict. This court then held, that the state board could not add twenty per cent. to the valuations on which the experts on both sides were in substantial accord arbitrarily and without evidence. *Long Dock Co.* v. *State Board of Assessors,* 86 Id. 592, 596. So, the personal knowledge and judgment possessed by the state board does not mean that something may be added to the valuations arbitrarily and without evidence. On the other hand, the effect of our adjudications is to require that, on review, the courts should not set aside the judgments of the state tribunal fixing valuations, which are based on evidence.

"We have therefore judgments of the Supreme Court, which are sought to be sustained upon reasons stated by the court, which are unsatisfactory, if not entirely untenable. These are rested as to a valuation at a point, where neither set of experts agree, and at a point somewhere between the high and low values fixed by the two sets of experts, the court, apparently, having overlooked the provisions of the statute, which expressly declares that these assessors shall be entitled to use their personal knowledge and judgment in ascertaining from the evidence the value of the property assessed. *4 Comp. Stat., p. 5272, § 16; Pamph. L. 1888, p. 280.*

"We conclude, therefore, after considering this record, and for the reasons stated, that the judgments of the Supreme Court involved in these three groups on appeal are without legal evidence to support them. They are therefore set aside and reversed, and the judgments of the state board of taxes and assessment are affirmed."

In *Hackensack Water Co.* v. *North Bergen Township,* 18 N. J. Misc. Rep. 627, at page 630 (1940), Quinn, President, who wrote the opinion of the State Board in the instant case, said, again with regard to the taxing district's witness:

"In contrast to the outstanding qualifications of petitioner's valuation expert, the witness through whose testimony the respondent attempted to meet the force of the former's testimony, was the township assessor, who, while technically competent to testify as such, possesses none of the special qualifications requisite to trustworthy appraisal in this specialized field of utility valuation. He has been an assessor for eight years, but has never had any experience as an engineer, builder or contractor, or in the sale or purchase of property of the character under appeal. * * * His testimony carried little or no probative weight."

In *Citizens' Gas Light Co.* v. *Alden,* 44 N. J. Law 648, at 652 (1882), Mr. Justice KNAPP, speaking for the Court of Errors and Appeals, said:

"Where a municipality, whose proceedings are attacked under a writ issued in aid of ejectment, stands as the only party in the writ, and it appears to the court that there are others in interest to be affected by the controversy, they will not proceed in it until such others are brought in, (*Fleischauer* v. *West Hoboken,* 10 Vroom 421,) and that upon principles of justice so obvious as to underlie all rational systems of law. No one can be bound without first being heard."

And in *Vanderhoven* v. *City of Rahway*, 120 N. J. Law 610, at pages 613-614 (1938), Mr. Justice PORTER, speaking for the Supreme Court, said:

> "In this situation we are of the opinion that the owner of the property complained of is entitled to notice without which the proceedings can have no validity.
>
> "The only notice given here was after the council had acted and it was not to give the prosecutor a hearing, but simply of notification that it had summarily decreed that she must demolish her buildings within thirty days. True she was then given an opportunity to appeal to the common council for a modification of its decision, but that is in no sense a hearing on a proposed action such as she was, in our view, clearly entitled to. The law is well established in this state that where property is to be taken for public use notice of such intention must first be given the owners so they may be heard, whether required by statute or not. Moreover, the statute under which this ordinance was enacted provided for notice in these words: 'Before any proceeding is taken pursuant to the provisions hereof, the governing body of the municipality shall cause notice of the contemplated removal or destruction of the building, wall or structure, to be given to the owner of the land affected thereby,' *Rev. Stat.* 40:48-1, *subsection* 15.
>
> "A few of the pertinent New Jersey cases on the necessity for notice follow: *New Jersey Turnpike Co.* v. *Hall*, 17 N. J. L. 337; *State* v. *Jersey City*, 24 Id. 662; *Vantilburgh* v. *Newark*, 25 Id. 309; *State of Newark*, 25 Id. 399 (at p. 411); *State* v. *Orange*, 32 Id. 49; *Hutton* v. *Camden*, 39 Id. 122; *Davis* v. *Howell*, 47 Id. 280; *Kearney* v. *Ballantine*, 54 Id. 194.
>
> "Concluding that the proceedings of the defendant were void because of this lack of notice resulting in a lack of opportunity for the prosecutor to be heard makes unnecessary a consideration of the other points

raised as to the constitutionality of the said statute or other alleged irregularities in the proceedings.

"The proceedings are set aside, with costs."

And this Court has again and again had occasion to judicially determine that due process requires notice and an opportunity to be heard, not by shadow form but in substance.

In *Hovey* v. *Elliott*, 167 U. S. 409, 417, 418; 42 L. Ed. 215, 221 (1897); Mr. Justice WHITE, speaking for the Court said:

> "• • • Bayley, B., says he knows of no case in which you are to have a judicial proceeding by which a man is to be deprived of any part of his property without his having an opportunity of being heard. • • •
>
> "And that the judicial department of the government is, in the nature of things, necessarily governed in the exercise of its functions by the rule of due process of law, is well illustrated by another observation of Judge Cooley, immediately following the language just quoted, saying: 'The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they "proceed upon inquiry," and "render judgment only after trial."' "

In *Rees* v. *The City of Watertown*, 86 U. S. 107, 122; 22 L. Ed. 72, 76-77 (1874); Mr. Justice Hunt said:

> "Thus, assume that the plaintiff is entitled to the payment of his judgment, and that the defendant neglects its duty in refusing to raise the amount by taxation, it does not follow that this court may order the amount to be made from the private estate of one of its citizens. This summary proceeding would involve a violation of the rights of the latter. He has never been heard in court. He has had no opportunity to establish a defense to the debt itself, or if the judgment is valid, to show that his property is not liable

> to its payment. * * * The proceeding supposed would violate that fundamental principle contained in chapter 29 of *Magna Charta*, and embodied in the Constitution of the United States, that no man shall be deprived of his property without due process of law—that is, he must be served with notice of the proceeding, and have a day in court to make his defense. *Westervelt* v. *Gregg*, 12 N. Y. 209 * * *
>
> "The general principle of law to which we have adverted is not disturbed by these references. It is applicable to the case before us. Whether, in fact, the individual has a defense to the debt, or by way of exemption, or is without defense, is not important. To assume that he has none and, therefore, that he is entitled to no day in court, is to assume against him the very point he may wish to contest."

In *Londoner* v. *City and County of Denver*, 210 U. S. 373, 386; 52 L. Ed. 1103, 1112 (1908); Mr. Justice Moody, said:

> "If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal. (Cases cited.)
>
> "It is apparent that such a hearing was denied to the plaintiffs in error. The denial was by the city council, which, while acting as a board of equalization, represents the state. Raymond v. Chicago Union Traction Co. 207 U. S. 20, ante, 78, 28 Sup. Ct. Rep. 7. The assessment was therefore void, and the plaintiffs

in error were entitled to a decree discharging their lands from a lien on account of it."

In *Roller* v. *Holly*, 176 U. S. 398, 409; 44 L. Ed. 520, 524 (1900); Mr. Justice BROWN said:

> "The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion.
>
> "That a man is entitled to some notice before he can be deprived of his liberty or property is an axiom of the law to which no citation of authority would give additional weight; but upon the question of the length of such notice there is a singular dearth of judicial decision. It is manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose."

In *Patton* v. *United States* 281 U. S. 276, 292; 74 L. Ed. 854, 860 (1930); Mr. Justice SUTHERLAND said:

> "* * * And no attempt has been made to overthrow it save by what amounts to little more than a suggestion that, by reducing the number of the jury to eleven or ten, the infraction of the Constitution is slight, and the courts may be trusted to see that the process of reduction shall not be unduly extended. But the constitutional question cannot thus be settled by the simple process of ascertaining that the infraction assailed is unimportant when compared with similar but more serious infractions which might be conceived. To uphold the voluntary reduction of a jury from twelve to eleven upon the ground that the reduction—though it destroys the jury of the Constitution—is only a slight reduction, is not to interpret that instrument but to disregard it. It is not our province to measure the extent to which the Constitution has been contravened and ignore the violation, if, in our opinion, it is not, relatively, as bad as it might have been."

In *Fillipon* v. *Albion Vein Slate Co.*, 250 U. S. 76, 81; 63 L. Ed. 853, 855 (1919), Mr. Justice PITNEY said:

> "We entertain no doubt that the orderly conduct of a trial by jury, *essential to the proper protection of the right to be heard,* entitles the parties who attended for the purpose to be present in person or by counsel *at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict.* Where a jury has retired to consider of their verdict, and supplementary instructions are required, either because asked for by the jury or for other reasons, they ought to be given *either in the presence of counsel or after notice and an opportunity to be present;* and written instructions ought not to be sent to the jury *without notice to counsel and an opportunity to object.* Under ordinary circumstances, and wherever practicable, the jury ought to be recalled to the court room, *where counsel are entitled to anticipate, and bound to presume, in the absence of notice to the contrary, that all proceedings in the trial will be had.* In this case *the trial court erred in giving a supplementary instruction to the jury in the absence of the parties and without affording them an opportunity either to be present or to make timely objection to the instruction.* * * *
>
> "The circuit court of appeals considered that * * * no harm had been done, and none was probable to arise under like circumstances, and hence affirmed the judgment.
>
> "It is not correct, however, to regard the opportunity of afterwards excepting to the instruction and to the manner of giving it as equivalent to an opportunity to be present during the proceedings. * * *
>
> "And, of course, in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmatively appears that they were harmless.
>
> "In this case, so far from the supplementary instruction being harmless, in our opinion it was erro-

neous and calculated to mislead the jury *in that it excluded a material element that needed to be considered in determining whether plaintiff should be held guilty of contributory negligence under the particular hypothesis referred to in the jury's question.*"

The subject is very fully considered and discussed in *McGehee's "Due Process of Law,"* (1906), especially at pages 75 and 76, where he states that:

"* * * In *Dr. Bently's Case,* Fortescue, J., quaintly remarks: 'The laws of God and man both give the party an opportunity to make his defense, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defense. Adam (says God) where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldest not eat? And the same question was put to Eve also.'[5]

"This doctrine was adopted into American jurisprudence to the fullest extent, and was referred to the principles either of natural justice,[6] of international law,[7] or of the common law.[8] 'It is a rule,' said Mr. Justice Story, 'founded in the first principles of natural justice, that a party shall have an opportunity to be heard in his defense before his property is condemned.' And of a foreign judgment which violated this rule, he proceeded: 'Upon the eternal principles of justice it ought to have no binding obligation upon the rights or property of the subjects of other nations, for it tramples under foot all the doctrines of international law.'[9] 'It is a rule as old as the law,' the Supreme Court has said, 'and never more to be respected than now, that no one shall be

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[5] Rex v. Cambridge University, 1 Stra. 558, 567.
[6] Lafayette Ins. Co. v. French, 18 How. (U. S.) 404.
[7] D'Arcy v. Ketchum, 11 How. (U. S.) 165.
[8] Picquet v. Swan, 5 Mason (U. S.) 35, *per* Story, J.
[9] Bradstreet v. Neptune Ins. Co., 3 Sumn. (U. S.) 600. And see Windsor v. McVeigh, 93 U. S. 274.

> personally bound until he has had his day in court; by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity want all the attributes of a judicial determination. It is judicial usurpation and oppression, and never can be upheld where justice is justly administered.' "[1]
>
> "The clauses in our constitutions guaranteeing 'the law of the land' and 'due process of law,' have always been held to include the opportunity to present any defenses which might affect the decision of the court or tribunal. The opportunity to defend implies notice of an official inquiry into the facts. * * * "[2]

Thus, from the beginning of time to the present day, the opportunity to be heard regarding one's rights, affecting his life, liberty, and property, has been a fundamental and invariable factor in the administering of justice, to which the Great Creator gave recognition, and which has been recognized and applied universally by man's tribunals everywhere.

How can Petitioner know and determine what motivated the State Board in disregarding the evidence adduced before it and ignoring the settled law applicable, or know and determine how, in what manner, by what method, if any, or by what process of reasoning, or upon what facts, or absence of facts, it reached its conclusion of value of the property involved,—a valuation which differs from any figure which otherwise appears in the record,—from the original assessment (Record, p. 411), from the reproduction figures submitted by the City (but which were not submitted for "tax purposes",—Record, p. 99, lines 20-40; p.

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[1] Galpin v. Page, 18 Wall. (U. S.) 350; Hovey v. Elliott, 167 U. S. 409.

[2] Simon v. Craft, 182 U. S. 436; Hooker v. Los Angeles, 188 U. S. 314, 318.

100, lines 1-28); and from the sale figure submitted by Petitioner (Record, p. 280, line 15; p. 297, line 26), which is the test of valuation for tax purposes by the statute and judicial decision. (See *ante*, pp. 5-6, 11-12).

For aught Petitioner knows, the Board, in substituting its own figure (Record, p. 73, lines 33, *et seq.*), may have resorted to the so-called "cubical contents" method used by Mr. Robertson, which is the merest guess, or the "quantity survey" used by Mr. Phillips, which is not accurate (*ante*, p. 9), or by giving effect to cost of reproduction, which has been judicially condemned, even by the State Board itself (*ante*, pp. 11-12), or may have used some *secret* or otherwise illegal calculation, of which Petitioner has never been apprised, and concerning either or any of which, and concerning the qualifications of the Board to fix the valuation as required by the statute and decisions, Petitioner had no opportunity to be heard in advance of judgment; for it was not until the Board's opinion was announced that Petitioner had any knowledge of this most extraordinary procedure. But certain it must be that the Board did not adhere to the statute's plain mandate and the Court's plain rulings, including President Quinn's own previous judicial declarations (*ante*, pp. 5-6, 11-12); for it has not been shown to have possessed the qualifications necessary to form a reliable opinion of sale valuation as between the willing buyer and the willing seller, and if it did adhere to the statutory and judicial mandate fixing the standard of valuation, it had no right to disregard and ignore the evidence of Mr. Ryer and Mr. Stack, which was the *only legal evidence in the case* which did conform to that standard and test (Record, p. 280, line 15, and p. 297, line 26, *ante*, pp. 15, 16).

It seems to us, therefore, that if, as the record now stands and as it stood on review in the New Jersey Supreme Court and in the Court of Errors and Appeals, it cannot be certainly determined on what theory the State Board

reached its secret conclusion and determination of valuation, or if it cannot be determined whether it based it upon a lawful or unlawful theory, then this Court should reverse the judgments of the State tribunals upon the authority of its recently enunciated principles, regardless of the other elements of error urged, in the case of

> *Williams* v. *North Carolina*, 63 Sup. Ct., 207; U. S. Adv. Ops. 1942-1943, Vol. 87, No. 5, page 189, at pages 191-192 Dec. 21, 1942).

There Mr. Justice DOUGLAS, speaking for this Court, said:

> "In the second place, the verdict against petitioners was a general one. Hence even though the doctrine of Bell v. Bell, 181 U. S. 175, 45 L. ed. 804, 21 S. Ct. 551, supra, were to be deemed applicable here, we cannot determine on this record that petitioners were not convicted on the other theory on which the case was tried and submitted, viz., the invalidity of the Nevada decrees because of Nevada's lack of jurisdiction over the defendants in the divorce suits. That is to say, the verdict of the jury for all we know may have been rendered on that ground alone, since it did not specify the basis on which it rested. It therefore follows here as in Stromberg v. California, 283 U. S. 359, 368, 75 L. ed. 1117, 1122, 51 S. Ct. 532, 73 A. L. R. 1484, that if one of the grounds for conviction is invalid under the Federal Constitution, the judgment cannot be sustained. No reason has been suggested why the rule of the Stromberg Case is inapplicable here. Nor has any reason been advanced why the rule of the Stromberg Case is not both appropriate and necessary for the protection of rights of the accused. To say that a general verdict of guilty should be upheld though we cannot know that it did not rest on the invalid constitutional ground on which the case was submitted to the jury, would be to countenance a procedure which would cause a serious impairment of constitutional rights."

The New Jersey Supreme Court is required by statute (R. S. 2:81-8) to review the record of the State Board and make its own findings of fact, as well as determination of law, and if it fails to do so, the Court of Errors and Appeals should, and has by other precedent, remitted the record on appeal and directed the Supreme Court to do so, or has retained the record and reviewed and determined the facts itself.

Freudenreich v. *Mayor, &c. of Fairview,* 114 N. J. Law 290, at 294;
Harman v. *Reed,* 108 N. J. Law 191, at 194;
Smith v. *Carty,* 120 N. J. Law 335, at 340;
Jordan v. *Borough of Dumont,* 105 N. J. Law 197;
N. J. &c. Water Co. v. *Board of Public Utility Commissioners,* 123 N. J. Law 303, at 308

where Mr. Justice PERSKIE, speaking for the Court of Errors and Appeals, said:

> "With these principles in mind, it is argued that the necessary inference to be drawn from the quoted language of the opinion of our Supreme Court is that the Supreme Court did make the same factual finding that the Board made. That may be so. But whether it did or did not make the required factual finding is not altogether free from debate. We regard it unwise to consider and determine a constitutional question upon such a state of the record.
>
> "We could, of course, remand the cause to the Supreme Court to make a definite finding. But we have frequently acknowledged our power to pass upon the merits in fairly comparable circumstances (*Jordan* v. *Borough of Dumont,* 105 N. J. L. 197, (and cases collated at p. 198); 143 Atl. Rep. 843; *Harman* v. *Reed,* 108 N. J. L. 191; 155 Atl. Rep. 145), and have at times exercised that power when we deemed it desirable to do so. *Smith* v. *Carty,* 120 N. J. L. 335 (at p. 340); 199 Atl. Rep. 12. Since all proofs are

before us, and since we are of the opinion that the protracted litigation of the issues here involved should be ended, we choose to adopt the course we have followed in *Smith* v. *Carty,* supra, and shall consider and determine this cause upon the merits."

And in *Gibbs* v. *State Board,* 101 N. J. Law 371, 374, Mr. Justice KATZENBACH, speaking for the Court of Errors and Appeals said:

"Under section 11 of the *certiorari* act of 1903 (*Comp. Stat., p. 405*), power is given to the Supreme Court to determine disputed questions of fact, as well as law. The Supreme Court did not determine any question of fact as appears from the language of its opinion above quoted. The testimony taken in the case should, in our opinion, be reviewed. The case will therefore be remanded to the Supreme Court, with the direction that it determine the disputed questions of fact."

Revised Statutes of N. J. 1937, 2:81-8:

2:81-8. *Questions of fact and law determined; testimony; Reversal or affirmance.* When a writ of certiorari is brought to remove any tax or assessment, or other order or proceeding concerning any local or public improvement, or to review the proceedings of any special statutory tribunal, or to review the suspension, dismissal, retirement or reduction in rank of a person holding an office or position, state, county or municipal from which he is removable only for cause and after trial, the court shall determine disputed questions of fact as well as of law, and inquire into the facts by depositions taken on notice or in such other manner as may be according to the practice of the court.

"The testimony taken before the tribunal, board or officer whose action is being reviewed may be used by any party and shall be considered by the court as if it had been taken by deposition on notice. Additional testimony may be taken by any party. The

> court may reverse or affirm, in whole or in part, such tax, assessment, or other order or proceeding, finding or determination, suspension, dismissal, retirement or reduction in rank reviewed."

But it is respectfully submitted that the Supreme Court opinion does not express such a review and finding of facts in the instant case (Record, pp. 603-607).

The Supreme Court stated in its opinion (Record, p. 604, line 38 *et seq.*), that:

> "The testimony of three witnesses on behalf of the prosecutor is that the value is $3,000,000. and $3,160,000. while that of two witnesses for the defendants ranged from about $6,000,000. to $7,000,000."
> * * *
> "We conclude that a factual question was presented and that there were proofs which justify the findings of the State Board."

This, it is respectfully submitted, is erroneous, as pointed out, *supra,* for the figures presented by the City's witnesses Robertson and Phillips (*ante,* p. 11) were not given for a "tax purpose", but simply to show their estimate of cost of reproduction less a slight allowance for depreciation. *There was no other testimony to establish "true value" for taxation purposes presented by the City,* except, perhaps, that shown by the Special Master's deed upon the public sale of the property, which was put in evidence by the City, and which showed a sale price of $2,100,000 (*ante,* pp. 17-18).

There was, therefore, *no factual* question presented, nor were there any *proofs to justify the findings of the State Board.*

The Supreme Court further stated (Record, p. 605, lines 16 *et seq.*) that:

> "There is a presumption in favor of the correctness of the assessments and the burden of proving

> that they were excessive is on the owner. Colonial Life Insurance Co. v. State Board of Tax Appeals, 126 N. J. L. 126."

Here, however, the State Board did not adopt the original assessment, which primarily may have the presumptive effect stated by the Court, and both the State Board and the Court failed to give consideration to the presumption in favor of the County Board's valuations, as indicated by the authorities cited at page 30, *ante*. But the Board caught a totally different figure out of the air and fixed that as the valuation. If its action in that respect is legally sustainable because the variance was not great, then it would be sustainable just the same if it had been millions in advance of the assessment. And, as expressed by Mr. Justice SUTHERLAND in *Patton* v. *United States*, quoted at page 51, *ante*, it is not the degree of variance involved that governs, but the fact that the Constitution is destroyed. The presumptive effect was gone when the Board laid aside the Assessor's figure and took its own different figure as the basis for its valuation, and the presumptive value of the County Board superseded it.

The Supreme Court disposed of the question of due process of law by intimating that there was nothing to complain about in the Board's acting as valuers of real property, or lack of opportunity to ascertain the method and course which the Board may have pursued in reaching its conclusion of value from its own inspection of the property (Record, p. 65, line 37, p. 73, line 32, p. 606, lines 18, 25), and indicating that:

> (a) Jurors often view premises in certain cases; and
>
> (b) That it is a proper function of the Board to use its own knowledge in appraising the taxable value of property (Record, p. 606, lines 18, 25).

(a) However, where a jury so views premises for the purposes which the Court stated, it is always done with full knowledge of the parties and their counsel, who have an opportunity to accompany the jurors, or if that be refused, a judgment rendered adverse to a complaining party is invalidated and reversed. It was that precise principle which Mr. Justice PITNEY discussed, speaking for this Court in *Fillipon* v. *Albion Vein Slate Co.*, cited *supra*, at page 52; and which was followed and applied by the Circuit Court of Appeals, 3rd Circuit, in *Breslin* v. *National Surety Co.*, 114 Fed. (2nd) 65, 68-9.

And recently this Court, in the case of *Enoch L. Johnson* v. *United States of America*, No. 273, October Term, 1942, has allowed a writ of certiorari to review a judgment of conviction where defendant was denied the right to be present on the argument before the Court, in Chambers, respecting the admission or rejection of evidence.

See, also,

Fina v. *United States*, 46 Fed. (2nd) 643, 644;
Arrington v. *Robertson*, 114 Fed. (2nd) 821, 823;
Nicola v. *United States*, 72 Fed. (2nd) 780, 783;
Farris v. *Interstate Circuit, Inc.*, 116 Fed. (2nd) 409, 412, where HOLMES, C. C. J., speaking for the Circuit Court of Appeals, 5th Circuit, said:

> "The consideration given by the jury to the testimony thus improperly admitted may or may not have affected its verdict. Since this court cannot be certain that it did not, *it must be presumed that reversible error was committed.*"

(b) The Supreme Court, it is respectfully submitted, also erred with regard to the State Board's function and power to use its personal knowledge in rendering its judgment, and failed to analyze the cases it cited in support of its

assertion in that respect. (Record, p. 606, line 37, p. 607, lines 31 *et seq.*)

The present State Board of Tax Appeals is of comparatively recent origin, having been created by the Legislature of the State of New Jersey by a statute approved *April 14, 1931,* effective July 1, 1931 (P. L. 1931, Ch. 100, p. 166; R. S. 54:2-1, *et seq.*).

The State Boards referred to in the decisions cited in the Supreme Court's opinion (Record, p. 607) were predecessors of the present State Board of Tax Appeals, and those cases were decided prior to the 1931 statute, the one in 86 N. J. Law, 592, in 1914, and the one in 100 N. J. Law, 131, in 1924.

They exercised an *assessing* function, and, under certain circumstances, the Board of Taxes and Assessment exercised an *appellate* function.

By Section 2 of the Act of April 14, 1931, it was provided that:

> "Said board shall do and perform all acts now required by any law to be done and performed by the State Board of Taxes and Assessment relative to the hearing and determination of tax appeals."

And by Section 4 of that Act it was provided that:

> "The board shall succeed to and exercise exclusively all the powers and perform all the duties concerning the *review, hearing and determination of appeals* concerning the assessment, collection, apportionment, or equalization of taxes which are now exercised or performed by or conferred and charged upon the State Board of Taxes and Assessment by virtue of any existing law or laws. *All tax appeals pending* before the State Board of Taxes and Assessment shall continue before and be determined by the board hereby established; and the said State Board of Tax Appeals shall have such other and further

> powers and perform such other and further duties in connection with the hearing and determination of tax appeals, as may be conferred or imposed upon it, from time to time."

And, as stated by President Quinn, in *City of New Brunswick* v. *Upsilon Chapter, &c.*, (1940), 18 N. J. Miscl. 147, at page 150:

> "We have heretofore recognized and applied the fundamental rule that, as a statutory tribunal, this board is strictly limited to the bounds of the jurisdiction prescribed by the legislation which constitutes it and defines its powers and duties. *Washington Township* v. *Mercer County Board of Taxation* (Supreme Court, 1914), 85 N. J. L. 547; 89 Atl. Rep. 1028; *Mellor* v. *Kaighn* (Court of Errors and Appeals, 1916), 89 N. J. L. 543; 99 Atl. Rep. 207."

But the cases cited by the Supreme Court involved the taxation of railroad property, which, as stated at page 5 *ante*, is governed by the Railroad Act, and not by the General Tax Act cited at pages 4 and 5, *ante*, under which the property of Petitioner was assessed. And by the Railroad Act, as pointed out in the decisions referred to by the Court, and which are also cited and quoted from herein (*ante*, pp. 41, 45), the *Assessors* were given statutory authority in Railroad assessments to exercise their personal knowledge. Nevertheless, those cases also emphatically hold that that *assessing* function is only to be exercised in a manner that comports with due process of law.

Furthermore, that pertained to the *assessing* power of the Board, which is quite different from its *appeal* power. And the *assessing* power is now exercised by the State Tax Commissioner (P. L. 1931, Ch. 336, p. 823, approved *April 28, 1931*, effective July 1, 1931). (R. S. 54:1-1, *et seq.*) By

that statute there was created a "State Tax department," which, by Section 1 of the Act,

> " * * * Shall succeed to and exercise exclusively all the powers and perform all the duties now exercised or performed by or conferred and charged upon the State Board of Taxes and Assessment by virtue of any existing law or laws, *excepting those relating to the review, hearing and determination of all appeals* concerning the assessment, collection, apportionment, or equalization of taxes. Said department shall have such other and further powers and perform such other and further duties in connection with *the assessment, collection, apportionment or equalization of taxes* and the administration of tax laws, as may be conferred or imposed upon it from time to time. All proceedings pending before the State Board of Taxes and Assessment *excepting tax appeals,* shall continue before and be determined by the State Tax Commissioner."

Section 2 of that Act provides, *inter alia,* that—

> "The chief officer of said department, to be denominated the 'State Tax Commissioner,' shall be appointed by the Governor, by and with the advice and consent of the Senate, to serve for the term of five years, and until his successor shall be appointed and qualified. * * * "

Section 8 provides that—

> "All acts and parts of acts inconsistent with this act are hereby repealed and this act shall be liberally construed and shall take effect on the first day of July nineteen hundred and thirty-one.
>
> "Approved April 28, 1941."

It is elementary that the later Act supersedes the earlier Act.

And *R. S. 54:1-6* provides that—

> "The commissioner shall perform all acts formerly required by law to be performed by the state board of taxes and assessment, *except the hearing and determination of tax appeals*, and shall carry into effect and execute the provisions of this chapter."

R. S. 54:2-35 provides that—

> Any action or determination of a county board of taxation may be appealed *for review* to the state board of tax appeals under such rules and regulations as it may from time to time prescribe, and it may *review* such action and proceedings and give such judgment therein as it may think proper."

R. S. 54:2-39 provides that—

> "Any appellant who is dissatisfied with the judgment of the county board of taxation upon his appeal, may appeal from that judgment to the state board of tax appeals by filing a petition of appeal to the board, in manner and form to be by said board prescribed, within one month from the date fixed for final decisions by the county boards, and the state board shall proceed summarily to hear and determine all such *appeals* and render its judgment thereon as soon as may be."

And with respect to appeals to the State Board of Tax Appeals from the determinations of the State Tax Commissioner, *R. S. 54:1-41* provides that—

> "54:1-41, appeals to state board of tax appeals; procedure.
>
> "Any person, taxing district, municipality, or county aggrieved by any act, proceeding, ruling, decision, or determination of the state tax department or of the state tax commissioner, may appeal there-

> from to the state board of tax appeals by filing a petition of appeal to the board in manner and form and within the time and subject to such terms and conditions as the board shall by reasonable rules and regulations prescribe unless the time and terms are fixed by statute, provided, however, that nothing herein contained shall be construed to permit any person to appeal to the board from the assessment or any other determination of the state tax department or commissioner in a transfer inheritance tax proceeding."

R. S. 54:2-34 defines and limits the jurisdiction of the State Board to *review, hear* and *determine appeals,* and provides as follows:

> "54:2-34. Appeals from state tax department and state tax commissioner.
>
> "The board shall review, hear and determine all appeals by any person, taxing district, municipality or county aggrieved by any act, proceeding, ruling, decision or determination of the state tax department or of the state tax commissioner."

It is obvious, therefore, that upon the creation of the State Board of Tax Appeals by Chapter 100 of the Laws of 1931, approved April 14, 1931, and the creation of the State Tax Department and a State Tax Commissioner by Chapter 336 of the Laws of 1931, approved April 28, 1931, the previously existing State Board of Tax Appeals, with its dual *assessing* and *appellate* function, ceased to exist, and the *assessing* function and the *appellate* function were separated, the *assessing* function being vested in the State Tax Department and the State Tax Commissioner and the *appellate* function in the State Board of Tax Appeals.

By the statute *R. S. 54:22-5* it is provided that—

> "In order to obtain the facts necessary for the discharge of his duties under Chapters 19 to 29 of

> this title (§ 54:19-1, *et seq.*), the state tax commissioner may use such lawful means as he may deem necessary. * * * The commissioner shall also use the returns provided for in Chapter 23 of this title (§ 54:23-1, *et seq.*), but they shall not be conclusive. If any returns are not made he shall ascertain the necessary facts from the best information he can obtain and in such manner as he may find convenient, *using his personal knowledge and judgment.*"

And by the General Tax Act, cited and quoted at pages 4-5, *ante,* applicable to the property involved in the instant case, it is provided that:

> "*The assessor* shall ascertain the names of the owners of all real property situate in his taxing district, and, *after examination and inquiry,* determine the full and fair value of each parcel of real property situate in the taxing district," &c. * * *

But the State Board of Tax Appeals is now given no such power of independent *assessing* inquiry as is vested in the State and Local tax *assessors,* but it is confined strictly to the exercise of its *appellate* function. As the Board itself asserted in the *Duke Power* case cited at page 2, *ante,* it is a Court, and it would seem most extraordinary and astonishing if it should be finally ruled and adjudicated that a *Court,* sitting on *appeal,* can lawfully and constitutionally lay aside the evidence and the record of a proceeding before it for judicial determination, and proceed to decide and determine it upon what it terms its personal knowledge of the situation, obtained secretly, and without affording the parties affected an opportunity of knowing about it or being heard regarding it until after its judgment has been rendered.

It is respectfully submitted, therefore, that the State Board of Tax Appeals went entirely outside its jurisdiction

in exercising an *assessing* function, and that in exercising such function it assumed a power which it did not possess in injecting its personal knowledge into the exercise of that non-existent function; and that in basing its determination of value upon a personal inspection of the property, in the exercise of its appellate function, and in the exercise of a non-existent power, without notice of its action to the taxpayer or affording it an opportunity to be heard regarding it, it denied Petitioner due process of law and the equal protection of the laws.

It is also respectfully submitted that the Supreme Court's approval of that action is likewise unsustainable, as pointed out *supra,* as is likewise *per curiam* affirmance thereof by the Court of Errors and Appeals, for by affirming such action they have placed their stamp of approval upon it; and, by failing to consider it, the Court of Errors and Appeals has denied Petitioner its right claimed under the Fourteenth Amendment of the Constitution of the United States (Record, pp. 71-81, 610-615).

It should be noted, also, that the statute *R. S. 2:27A-6* provides that:

> "On pronouncing any judgment, order or decree, either of affirmance or reversal, the opinion of the court of errors and appeals, *containing the reasons for such affirmance or reversal,* shall be delivered in writing."

In affirming the judgment of the Supreme Court, however, the Court of Errors and Appeals expressed no consideration of the merits involved, and made no mention of the due process and equal protection features asserted and claimed by Petitioner under the Fourteenth Amendment. Its opinion is as follows (See Record, p. 616):

"Nos. 42, 43, 44 and 45. May Term, 1942.

NEW JERSEY COURT OF ERRORS AND APPEALS.

HARBORSIDE WAREHOUSE COMPANY, INC.,
Prosecutor-Appellant,

vs.

CITY OF JERSEY CITY, *et als.*,
Defendants-Respondents.

Argued May 21st, 1942; decided September 18, 1942

On appeal from a judgment of the Supreme Court.

For the appellant: Wall, Haight, Carey & Hartpence, Esqs.

For the respondents: Charles A. Rooney, Esq., Frank P. McCarthy, Esq., and John F. Lynch, Jr., Esq.

PER CURIAM

The case as presented exhibits only a dispute of fact with regard to the proper valuation of a warehouse building for purposes of taxation. The determination of the State Board of Tax Appeals, whose opinion is reported at 19 N. J. Misc. Rep. 222, adjudged a valuation which was affirmed in the Supreme Court, whose opinion is reported at 128 N. J. Law 263.

The settled rule in cases of this class is that, where the judgment of the Supreme Court on the facts is supported by proper evidence, this court will not reverse its findings. Kohn vs. McCormick, 103 N. J. Law 110; Angelotti vs. Town of Montclair, 109 id. 360; Ford Motor Co. vs. Fernandez, et al., 114 id. 202.

The judgment will be affirmed.

ENDORSED "FILED
SEP 18, 1942
J. A. BROPHY,
Clerk."

This, it is respectfully submitted, does not conform to the requirement of the statute R. S. 2:27A-6, quoted *supra*, and, in effect, indicates a failure to review the judgment of the Supreme Court and the proceedings in the State Board of Tax Appeals presented by the record, as exacted by the statutes and the Constitution, and denies Petitioner the due process of law and the equal protection of the laws claimed under the Fourteenth Amendment of the Constitution of the United States. Nowhere does it point out what the "dispute of fact" regarding valuation is, nor what the "proper evidence" is of the facts asserted in support of the judgment of the Supreme Court. And we respectfully submit that we have demonstrated that there is no such "dispute of *fact*" regarding valuation, nor is there any "proper evidence" in the case to support the findings of the State Board or the judgment of the Supreme Court.

Conclusion.

For the reasons set forth above, therefore, it is respectfully submitted that this case is one which justifies the granting of a writ or writs of certiorari and thereafter reviewing and reversing the adverse judgments involved, and that the writs prayed for should be granted.

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(20)

United States Supreme Court

Nos. 677, 678, 679, 680.

October Term, 1942.

HARBORSIDE WAREHOUSE COMPANY, INC., a corporation, *Petitioner,* vs. THE CITY OF JERSEY CITY, a municipal corporation, and THE STATE BOARD OF TAX APPEALS, OF THE STATE OF NEW JERSEY.	On Application for Writ of Certiorari. (1935 Tax)
HARBORSIDE WAREHOUSE COMPANY, INC., a corporation, *Petitioner,* vs. THE CITY OF JERSEY CITY, a municipal corporation, and THE STATE BOARD OF TAX APPEALS, OF THE STATE OF NEW JERSEY.	On Application for Writ of Certiorari. (1936 Tax)
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BRIEF ON BEHALF OF THE CITY OF JERSEY CITY IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

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BRIEF ON BEHALF OF THE CITY OF JERSEY CITY IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

Summary of Argument.

The petition deals at length with the question whether the valuations were made in accordance with the law of the state. It is not clear whether petitioner seeks to assert that any constitutional right was violated by reason of any of the alleged errors in the determination of the valuations

other than the error alleged to exist in the fact that the State Board inspected the premises. Although the petition expatiates on the various errors allegedly committed by the state tribunals, the constitutional argument advanced in the brief in support of the petition appears to be confined to the proposition contained in the following heading at page 39:

> "Petitioner was entitled to notice of the asserted action of the State Board of Tax Appeals in making a Personal Visit to the property of Petitioner, with an opportunity to be heard regarding its action, its qualifications and its method of determining value."

The following is a summary of our answer to the petition: In so far as petitioner challenges the correctness of the valuation and asserts that the state courts committed error in the application of state law in the determination of the true value of property, it fails to present a federal issue. There is no claim that the state tribunals singled out petitioner and intentionally subjected it to discriminatory taxation.

With respect to the inspection of the premises, by the State Board, we contend that whether or not a state tribunal may view property which is the subject matter of controversy as to value, is wholly a matter of state law, and that a determination by the state courts of that question, one way or the other, does not involve any infringement of the Fourteenth Amendment. There is no proof that the State Board did anything more than examine the premises as an aid in sifting the conflicting proof. There is no evidence that the State Board made an independent valuation on the basis of its inspection and apart from the testimony before it. It is not shown that petitioner was injured by the absence of notice of the inspection.

If it be assumed for argument that the State Board made an independent appraisal of the property based upon the inspection, such procedure would not, in any event, constitute a denial of due process because there was available to petitioner a right of review in the New Jersey Supreme Court, affording a full opportunity to be heard with respect to the correct valuation of the property. Petitioner did in fact pursue that remedy and received in the State Supreme Court a complete independent review of the issue of valuation. In the State Supreme Court proceedings petitioner had full opportunity to inquire into what the State Board did in connection with its inspection, what use it made of that inspection, and whether the members of the Board possessed qualifications sufficient to support any appraisal which it may have made. Petitioner did not undertake to adduce such proof. At any rate, the independent and complete review before the State Supreme Court fully satisfies the constitutional requirement of due process of law.

Argument.

I.

Assuming that the state tribunals incorrectly applied the principles of state law relating to the determination of the true value of the property, such error does not present a Federal question.

The bulk of the petition is devoted to a discussion of alleged errors in the determination of the true value of the building. It is alleged, for example, that too much emphasis was given to reproduction cost and inadequate emphasis to earnings. It is further pointed out that there

was no testimony offered by the City concerning the selling value of the building alone, whereas it was claimed that such testimony was adduced by petitioner and that the state tribunals were compelled to accept petitioner's proof.

It is further contended that the value of the property should have been determined in the light of the fact that the petitioner is a lessee of the land, which circumstance, it is claimed, reduces the value of the building beyond the value which it would have if the ownership of the building and of the land were in a single taxpayer. Petitioner challenges the correctness of the position of the state tribunals that the true value of land and building should be first determined as a unit and the value of the building ascertained by subtracting the value of land from the total valuation, without regard to private arrangements between the owners of the land and the owners of the building which, if given effect, might destroy the intrinsic value of the property.

The views of the state tribunals on these issues are lucidly expressed in the opinion of the State Board which appears at page 60 of the record, and in the opinion of the State Supreme Court which appears at page 603.

It is well settled that the Fourteenth Amendment does not guaranty that judgments of state courts will be free from error. The Fourteenth Amendment does not operate to impose upon the federal courts the function of super courts of appeals to review the correctness of the application of the state law by the state judiciaries. The fact of error in the application of state law does not constitute a denial of due process of law or equal protection of the law.

Milwaukee Electric Ry. & Light Co. v. *Wisconsin*, 252 U. S. 100 (1920);

Worcester County Trust Co. v. *Riley*, 302 U. S. 292 (1937);
12 *Am. Jur.* 250, 273.

In *Nashville, Chatanooga & St. Louis Ry.* v. *Gordon Browning*, 310 U. S. 362 (1940), it was held that mere excessiveness of taxation does not constitute a violation of the federal constitution and that a federal question is raised only by a showing that the particular taxpayer was singled out for arbitrary and capricious treatment. Petitioner does not charge that it was thus selected for discriminatory treatment.

Although we believe that in the light of the authorities cited above, this court is not interested in a discussion of the evidence upon which the judgment of the state tribunals was predicated, nevertheless, a treatment of that proof is appended to this brief to demonstrate that the judgment is fully warranted.

II.

The inspection by the State Board of the property in question, without notice to the parties, does not constitute a violation of any constitutional guaranty.

Although the State Board is an appellate body, it nevertheless hears and determines the issues of fact *de novo* and on a new record prepared before it. The inspection of the premises in question is no different in kind from the commonplace examination of a locus by a jury. Surely, the bare fact of such examination is not incompatible with a fair determination of a controversy. On the contrary, such examination is conducive to a proper determination thereof for obviously, the trier of the facts is in a better

position to appraise testimony after examining the subject matter to which it relates.

Petitioner's complaint is that the parties were not notified of the time of such inspection. Petitioner, however, does not demonstrate that such failure has in anywise resulted in injury to it. The presence of its representative could not have been of any material consequence.

No authority has been cited to support the contention that a view of the premises by the trier of the facts without notice to the parties invades the constitutional right of due process. The authorities cited by petitioner to the effect that a litigant is entitled to notice of hearing, obviously do not bear upon the question whether a view may be had in the absence of such notice. Whether such view constitutes error under the law of any particular state is not the constitutional test. That test must be whether a practice permitting a view by a trial judge without notice constitutes a flagrant departure from the essentials of due process as they are universally conceived to be. The Fourteenth Amendment was not intended to freeze all legal procedure into one mold. If men may differ as to the fairness of a particular practice, no constitutional violation can be found. Surely, no one can assert that the absence of notice with respect to the view of a building, the true value of which is in dispute, where such view is made by a body which is skilled both in the trial of the facts and in the application of the law, constitutes an arbitrary and capricious procedure.

It has been held that the defendant to a criminal proceeding is not entitled to be present at a jury view of the scene of the crime.

Snyder v. *Massachusetts*, 291 U. S. 97 (1934);
14 *Am. Jur.* 903;
90 *A. L. R.* 598;

Wigmore on Evidence, 3d Ed., Vol. VI, p. 251 (1940).

It is an *a fortiori* proposition that a party to a civil litigation cannot assert such constitutional right.

Petitioner assumes in its argument that the State Board did more than merely inspect the property, and that the State Board in fact made its own independent appraisal. There is nothing in the record to warrant that assumption. The statement by the State Board in its opinion that it based its result upon the proofs and a view of the premises, does not warrant the inference that the State Board ignored the proofs and rested its result upon its own appraisal. The more natural interpretation is that the State Board rested its result upon the proofs judged in the light of the view of the premises.

If it be assumed for argument that an independent appraisal by the State Board would support a claim of invasion of a federal constitutional right, it surely is incumbent upon petitioner to demonstrate the existence of facts upon which it bases that claim. The state practice afforded petitioner a full opportunity to place in the record the exact story of what the State Board did upon the inspection of the premises and the use which it made of its observations. *Long Dock Co.* v. *State Board of Assessors*, 86 N. J. L. 592 (E. & A. 1914); *City of Hoboken* v. *State Board of Tax Appeals*, 14 N. J. Misc. 207 (Sup. Ct. 1936), appeal dismissed, 117 N. J. L. 119 (E. & A.) 1936). Petitioner not having undertaken to adduce the precise facts may not now be heard to predicate a claim of denial of due process upon the assumption that the proof, if adduced, would have demonstrated such violation.

In *Lynch* v. *People of New York*, 293 U. S. 52 (1934), this court said at page 54:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. *De Saussure* v. *Gaillard,* 127 U. S. 216, 234, 8 S. Ct. 1053, 32 L. Ed. 125; *Johnson* v. *Risk,* 137 U. S. 300, 306, 307, 11 S. Ct. 111, 34 L. Ed. 683; *Walter A. Wood Mowing & Reaping Machine Co.* v. *Skinner,* 139 U. S. 293, 295, 297, 11 S. Ct. 528, 35 L. Ed. 193; *Eustis* v. *Bolles,* 150 U. S. 361, 366, 367, 14 S. Ct. 131, 37 L. Ed. 1111; *Whitney* v. *California,* 274 U. S. 357, 360, 361, 47 S. Ct. 641, 71 L. Ed. 1095; *Mellon* v. *O'Neil,* 275 U. S. 212, 214, 48 S. Ct. 62, 72 L. Ed. 245."

Since the facts necessary for the presentation of the federal question which petitioner claims to exist, were not placed in the record in the state courts, it is obvious that the judgments of the state courts did not depend upon the resolution of any federal question, and it is equally clear that there is no basis whatever upon which this court can find and determine any federal issue.

III.

Assuming for argument that the procedure followed by the State Board offends the Fourteenth Amendment, the full hearing afforded to petitioner before the New Jersey Supreme Court eliminates any issue of due process of law.

It is, of course, elementary that a taxpayer is entitled to an opportunity to be heard at some time before the tax becomes final and conclusive. *Londoner* v. *Denver,* 210 U. S. 373 (1908).

If it be assumed for argument that the State Board in fact made an original appraisal of the property in connection with its inspection, and that the State Board completely ignored the proofs before it, it nevertheless would not follow that any constitutional right of the petitioner was impinged. This is true because petitioner was afforded a full review of the assessment before the New Jersey Supreme Court. R. S. 2:81-8 provides as follows:

> "When a writ of certiorari is brought to remove any tax or assessment, or other order or proceeding concerning any local or public improvement, or to review the proceedings of any special statutory tribunal, or to review the suspension, dismissal, retirement or reduction in rank of a person holding an office or position, state, county or municipal, from which he is removable only for cause and after trial, the court shall determine disputed questions of fact as well as of law, and inquire into the facts by depositions taken on notice or in such other manner as may be according to the practice of the court.
>
> "The testimony taken before the tribunal, board or officer whose action is being reviewed may be used by any party and shall be considered by the court as if it had been taken by deposition on notice. Additional testimony may be taken by any party. The court may reverse or affirm, in whole or in part, such tax, assessment, or other order or proceeding, finding or determination, suspension, dismissal, retirement or reduction in rank reviewed."

It is well settled that the State Supreme Court sits as a trier of the facts and hears the matter *de novo*. Indeed, the inquiry is not confined to the record before the State Board. New proofs may be offered either in support of, or in the attack upon, the State Board's judgment.

Long Dock Co. v. *State Board of Assessors*, 86 N. J. L. 592 (E. & A. 1914);

Trenton & Mercer County Traction Corp. v. *Mercer County Board of Taxation*, 92 N. J. L. 398 (E. & A. 1918);

Lawrence Township v. *State Board of Tax Appeals*, 124 N. J. L. 465 (Sup. Ct. 1940);

Haworth v. *State Board of Tax Appeals*, 127 N. J. L. 67 (Sup. Ct. 1941);

Hoboken v. *State Board of Tax Appeals*, 127 N. J. L. 179 (Sup. Ct. 1941), affirmed, 128 N. J. L. 321 (E. & A. 1942).

As we pointed out above, either party may subpœna members of the State Board in order to place upon the record such matters as they may deem to be material.

Long Dock Co. v. *State Board of Assessors, supra; City of Hoboken* v. *State Board of Tax Appeals, supra.*

There can be no doubt that the review thus provided for in the New Jersey Supreme Court fully satisfies the requirements of due process. Petitioner does not appear to argue to the contrary, but rather claims that the Supreme Court failed to discharge its statutory duty of making an independent finding of fact. After reviewing the facts, the state court said (R., p. 605, l. 14):

> "We conclude that a factual question is presented and that there were proofs which justified the findings of the State Board. There is a presumption in favor of the correctness of the assessments and the burden of proving that they were excessive is on the owner. • • • ."

The quoted language is not inconsistent with an actual determination by the Supreme Court with respect to the factual issue of valuation. In reviewing this judgment of the Supreme Court, the Court of Errors and Appeals ex-

pressly treated the decision of the Supreme Court as constituting a finding of fact by it as to the valuation of the property. It said at page 617, line 8:

> "The settled rule in cases of this class is that, where the judgment of the Supreme Court on the facts is supported by proper evidence, this court will not reverse its findings. * * * "

The contention of petitioner that the State Supreme Court did not make a finding of fact, involves an assumption of ignorance on the part of members of that court of routine practice relating to review of the judgments of the State Board of Tax Appeals. It is so thoroughly settled, as is indicated by the decisions cited above, that the State Supreme Court is charged with the function of making an independent fact finding, that it should not be lightly assumed that the court failed in that duty. In this regard it should also be noted that where the Supreme Court fails to make a finding of fact, the Court of Errors and Appeals may itself make such finding of fact or return the matter to the Supreme Court for its decision. The supporting authorities are cited by petitioner at page 57 of its moving papers. The fact that the Court of Errors and Appeals did not remand the matter to the Supreme Court and did not make its own finding, demonstrates that that tribunal regarded the opinion of the Supreme Court as indicating that it fully discharged its statutory duty.

It is well settled that this court will not review the question whether the state courts determined a controversy in conformity with the state law. In *United Gas Public Service Co.* v. *State of Texas*, 303 U. S. 123 (1938), this court said at page 139:

> "With respect to the proceedings in the state courts, appellant urges that the case was not tried and determined as required by state law, and we are referred to the state statutes and the decisions of the Texas courts as to the proper procedure in the trial court

and on appeal. It is not our function, in reviewing a judgment of the state court, to decide local questions. We are concerned solely with the asserted federal rights. The final judgment of the state court in the instant case must be taken as determining that the procedure actually adopted satisfied all state requirements. *John* v. *Paulin*, 231 U. S. 583, 585, 34 S. Ct. 178, 58 L. Ed. 381; *Lee* v. *Central of Georgia R. Co.*, 252 U. S. 109, 110, 40 S. Ct. 254, 64 L. Ed. 482; *Central Union Co.* v. *Edwardsville*, 269 U. S. 190, 194, 195, 46 S. Ct. 90, 91, 70 L. Ed. 229."

In determining the issue of fact, the State Supreme Court stated that the burden was upon petitioner to overcome the presumption of validity in favor of the assessment. In the *Lawrence Township* and *Haworth* cases cited *supra*, the New Jersey courts stated that, in exercising their duty to make an independent fact finding, the courts would start with the premise that the burden of persuasion was upon the party attacking the State Board judgment. The fact that the burden of proof is imposed upon a party to the controversy does not operate to deny due process.

Minnesota & St. Louis R. R. Co. v. *Minnesota*, 193 U. S. 53 (1904);
James-Dickinson Farm Mtge. Co. v. *Harry*, 273 U. S. 119 (1927);
86 *A. L. R.* 179;
12 *Am. Jur.* 315.6.

Conclusion.

It is, accordingly, respectfully submitted that the application for writs of *certiorari* be denied.

Respectfully submitted,

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Attorney for and of Counsel
with City of Jersey City.

ADDENDUM.

The Tax History.

Petitioner lays great stress upon the "Tax History."

In the first place, even if the Tax History were at the same figures through all the years and if increases were difficult of explanation, the State Board, after due consideration, revised the assessments herein from $5,137,000 to $5,000,000. Therefore, particularly appropriate is the language of Mr. Justice Heher in the case of *Colonial Life Insurance Company of America* v. *State Board of Tax Appeals*, 126 N. J. L. 126, where it is said at page 130:

> "It suffices to add that the '*tax history*' introduced by prosecutor *does not destroy the presumption in favor of the assessment, as revised,* and to cast the burden of proof upon the municipality * * *."

Secondly, the State Board duly considered the Tax History, as an examination of the opinion below will clearly reveal (S. C., p. 64, ll. 20-40; p. 65, ll. 1-40). Thirdly, the judgments of the County Board reducing the assessment were each a nullity and can hold no weight because they were rendered without proofs. (*Washburn* v. *State Board*, 127 N. J. L. 321, 322.) As for the only judgment of the State Board which shows a reduction, that for the 1932 tax, that judgment was excluded from evidence for the reason that it was immaterial, and rightly so, for the property as of the assessing date, for 1932 taxes, namely October 1, 1931, was not, as will be shown, *infra*, the same property as on the assessing dates for the tax years here under consideration (S. C., p. 153, ll. 15-30; pp. 149-151). Another and very cogent reason for its immateriality as to true value was that the predecessor of the Warehouse

Company was in bankruptcy at the time of the judgment (S. C., pp. 325-349). Further, it was at the very depth of the depression period and municipal revenues were low. Is it any wonder that the City consented to the reduction, as it did? (Ex. R-2, S. C., p. 412).

A thoughtful examination will in fact reveal this tax history to be not "arbitrary" as petitioner says but entirely reasonable and comfortable with attendant circumstances.

Never was the language of Justice Black in *United N. J. R. R., etc., Co.* v. *State Board,* 100 N. J. L. at 313, more appropriate:

> "* * * Each annual assessment for taxation is a separate entity, distinct from the assessment of the previous or subsequent years. * * *."

During the years 1931, 1932 and 1933, the predecessor of the Warehouse Company and the then owner of this building was in bankruptcy. Depression had come on. The City, for the taxing years 1932, 1933 and 1934, consented to the reduction. If it did so because of the compulsion of the taxpayer's precarious economic status or of the heavy task of the City to obtain revenue under those conditions, its action is not and should not be indicative of an admission that the judgment consented to represented true value, nor is its action inexplicable.

Petitioner says that the increase in assessments was "arbitrary." Let us see:

The last assessment of $3,000,000—and that in necessitous times with a bankrupt taxpayer—was for the year 1934 and was made as of the assessing date, October 1, 1933.

Here it must be recalled that this Warehouse consists of three units. President Quinn found that Unit 1 represents approximately three-thirteenths of the whole; Unit

2, five-thirteenths; and Unit 3, five-thirteenths. This, of course, is an approximation. Prosecutor's witness, Eugene L. Goldsmith, testified that Unit 1 is about one-fifth of the whole and Units 2 and 3, each, about two-fifths.

Now, as of the assessing date at which $3,000,000 was last set as the assessment, *Unit 1 was the only building complete.* Thus, only three-thirteenths or one-fifth, whichever estimate is taken, was as of that date fully usable. Unit 3 was not usable. Eugene L. Goldsmith, who had charge of the completion of the building, testified (S. C., p. 156, l. 27; p. 157, ll. 1-12):

> "Q. But it was partially incomplete? A. Very small.
> Q. Unit No. 3 was open to the elements during that period of three years and considerable damage done to it through the elements? A. That is right.
> Q. How big is Unit No. 3? A. I am unable to state that. I don't recall. Unit 2 and 3 are substantially the same size.
> Q. Isn't Unit 3 about two-fifths of the entire Harborside Warehouse. A. Well, roughly, yes.
> Q. And Unit 2 is about two-fifths and Unit 1 is about one-fifth? A. Yes."

Specifically, the so-called "Completion Agreement" between the Pennsylvania Railroad Company and Harborside Warehouse Company (Exhibit P-2), set forth the completion details necessary (S. C., p. 355, l. 25; p. 356, l. 36):

"SCHEDULE A

(a) Complete ceiling outlets and switches in front section, third floor, and up;
(b) Fill in pipe sleeve openings;
(c) Complete plugged toilet fixtures;
(d) Install 'I' beam for hoisting of 10-ton capacity;
(e) Complete all elevators.

SCHEDULE B

Protection of Unit No. 3 Against Deterioration

(a) Glaze the building so as to make it weather proof;

(b) Do such acts and take such action as you may deem fit to protect and prevent all metal parts of the building, equipment, fixtures and electrical and other equipment from rust, corrosion and deterioration;

(c) Complete the stairway;

(d) Remove the debris chute on the north side of the building;

(e) Complete all elevators.

SCHEDULE C

General Items

(a) Grade and pave the yard between Units Nos. 2 and 3;

(b) Clean the pipe tunnel and drill holes for valves;

(c) Screen over all roof leaders and levels;

(d) Build directories for all Units;

(e) Provide proper drains for all roofs;

(f) Complete ramp."

These, it will be noted, are far more substantial as to Unit 2 than testified to by Mr. Goldsmith (S. C., p. 153, ll. 23-26).

Actually $240,200.54 was spent by the Pennsylvania Railroad to complete these buildings. Petitioner belittles this sum. Actually, without these completions, Unit 3, representing 5/13ths of the whole Warehouse, was useless. Unit 2 was by the completion undoubtedly made far more useful and valuable to the taxpayer than it had been before, than it had been when in 1932 and 1933 (assessing dates for 1933 and 1934 taxes) it acquiesced in an assessment of $3,000,000 (S. C., pp. 411-413). In other words, assum-

ing but by no means conceding, that $3,000,000 was a fair assessment for 1933, and without considering the value of the completion of Unit 2 (and they were substantial; see S. C., pp. 355, 356), the completion as to Unit 3, making it a usable building and not subject to deterioration from the elements, represented an increase in usable value of ⅝ of the value to which the Warehouse Company consented namely, ⅝ x $3,000,000, or $1,875,000. This, then, would make the total $4,875,000. It is not unreasonable to assume that the improvement and completion to Unit 2 (as mentioned in Schedule "A" of completion agreement, S. C., p. 355), of completing ceiling outlets and switches in front section, third floor and up, filling in pipe sleeve openings, completing plugged toilet fixtures, installing "I" beam for hoisting of ten-ton capacity and completion of all elevators, did not, with the use of Unit 3, account for the assessment of $5,137,000, as set by the City.

Thus, even assuming that the $3,000,000 assessment for 1934 was correct, the increase to $5,137,000 for 1935 is clearly reasonable. But we cannot overlook the fact that on October 1, 1933, assessing date for 1934, the taxpayer was a bankrupt, a circumstance graphically revealing the fact that the assessment for that year must have been tempered by the necessity of the City to salvage what it could from a hulk with the "smell of bankruptcy around it," as expressed by prosecutor's witness, Mr. Morrison (S. C., p. 171, ll. 18-20), and at a time when municipalities were notoriously short of cash.

True Value.

Petitioner's main contention in this respect is grounded in three phases:

> (a) No witness for the City stated an opinion which specifically stated what the property would sell for as between a willing seller and willing buyer on the assessment dates;
>
> (b) Both of petitioner's expert witnesses did specifically state an opinion in that respect;
>
> (c) The contention that the City relies upon "reproduction cost" as the sole factor in fixing the "true value" of the property.

These contentions of petitioner will be taken up *seriatim*, under the titles (a) "Selling price as true value," (b) "Petitioner's proof of true value," and (c) "Respondent's proof of true value."

(a)

Selling Price as True Value.

Petitioner cites the case of *Universal Ins. Co.* v. *State Board of Tax Appeals*, 118 N. J. L. 538. That case is sufficient to answer the attack made in this point by petitioner that an opinion as to "selling price" is the sole determinative of "true value." The language of Justice Perskie, it is submitted, is pertinent (p. 540):

> "The basic weakness of this attack is that prosecutors proceed on the theory that exchange value or market value is the invariable test of true value under all circumstances. This is not so. In the words of our Court of Errors and Appeals in *Newark* v. *Tunis*, 82 N. J. L. 461, 81 Atl. Rep. 722 (opinion by Parker, J.), '* * * *true value is not always to be ascertained by*

> *reference to selling price'*; * * * special circumstances may increase or depress market value without affecting true value or vice versa." (Italics mine.)

And, further on:

> "The case of *Newark* v. *Tunis, supra,* stands, therefore, for the principle that, under ordinary and normal conditions, exchange or *market value is a workable but not invariable test of true value.* 'It (market value) is nothing more than a convenient index and evidence of true value under ordinary and normal conditions.' Id." (Italics mine.)

Here, it is respectfully submitted, there can be no competent evidence of market value under the circumstances of this case.

The buildings here under consideration are of a unique character, being subject to a lease, at the termination of which their ownership will revert to the lessor, the Pennsylvania Railroad Company (Exhibit P-2, pp. 369-402). The Warehouse could not sell the building except as subject to the lease (Id.). In fact, it could not sell the building without the consent of the Railroad Company, for Article 12 of the agreement between the lessor and petitioner's predecessor specifically prohibits assignment of the land lease without a consent in writing by the Pennsylvania Railroad, excepting the assignment was made to persons, corporations, or trust companies holding a mortgage or mortgages on the interest of the lessee (Exhibit P-2, S. C., p. 386, ll. 30-40). The entire Warehouse by location and use is integrated with the purposes of the Railroad Company, on one side with its rail traffic, on the other with waterfront traffic. Its construction provides for tunnels, ramps, and driveways used by the Railroad Company (Exhibit P-2, p. 378, ll. 24-40; p. 379, ll. 1-12).

Who would buy these buildings under such restrictions, other than one in a community of interest with the Railroad

Company? It is respectfully submitted that there can be no market for the property under consideration and the entire record establishes that in fact there was none.

The property is much like, though patently less marketable than, that in the case of *Happiness Candy Store* v. *Sexton*, 2 N. Y. Supp. (2nd) 725. There the building was erected by the Happiness Candy Stores on the land of another. The New York Supreme Court in that case said:

> "There being no market, as the word is understood, the tax assessor must take and use any element which may aid in the determination of the fair value of the land and improvement."

And, in a similar case, *Hotel Astor* v. *Sexton*, 287 N. Y. Supp. 746, the Supreme Court of New York said:

> "Under the circumstances, no other means appear to be available for fixing the value of the building itself as distinguished from the land. The reproduction cost thereof should enter into the consideration."

And also similar was the case of *People, ex rel N. Y. Stock Exchange Bldg. Co.* v. *Cantor*, 221 App. Div. 193, affirmed 248 N. Y. 533, 162 N. E. 514. The building was unique and had no "sale value," and the court held that market value was to be used as a criterion only under circumstances where it faithfully reflected the full, true value.

Exactly in point, however, is the case of *Jersey City* v. *Seaboard Terminal, etc., Co.*, 19 N. J. Misc. 178, after which decision the taxpayer applied to the Supreme Court for a writ of certiorari. The application was denied (Supreme Court, No. 229, October, 1941), in an unreported decision, wherein the Court significantly comments:

> " * * * no fairly debatable question of fact or law is made to appear * * * ."

In the *Seaboard* case, the City, as here, offered no testimony of selling price. In that case, as here, a warehouse was erected on land leased by the taxpayer from a railroad, the Erie, whose operations were integrated with the functions of the warehouse. And the State Board, per Quinn, President, said at page 182:

> "Petitioner's proofs were primarily based upon depreciated replacement cost of the building, both from the standpoint of cubic foot units and of detailed quantity survey. While proof of this character, dissociated from the selling value of the property, is ordinarily of low probative value (Central Railroad Co. v. State Board (Supreme Court, 1886), 49 N. J. L. 1; 7 Atl. Rep. 306; Turnley v. Elizabeth (Supreme Court, 1908), 76 N. J. L. 42; 68 Atl. Rep. 1094; Schetty v. City of Jersey City (State Board, 1940), 18 N. J. Misc. R. 37; 11 Atl. Rep. (2d) 18), *yet where structures of unique character, not usually sold in the real estate market, are involved, as here, resort to consideration of the physical constituents of the building and their cost may be justified.* Ranck v. City of Cedar Rapids, 134 Ia. 563; 111 N. W. Rep. 1027." (Italics mine.)

And the State Board rejected the estimate of market value made by taxpayer's witness, Mr. Weise, because he ascribed as a factor, the leasehold interest of the taxpayer (p. 185). So here, petitioner's real estate expert, Mr. Ryer, testified (S. C., p. 282, ll. 18-28):

> "(Question repeated): 'You mean, you figured the market value of this building without land?'
>
> A. I don't know that I can answer that question directly, yes or no. *I figured the value of this building under a lease of the land.* That is what I tried to tell you before.
>
> Q. *Do you mean, Mr. Ryer, that at the expiration of this lease, that this building will have no value?*
>
> A. *No value to the owner.*

Q. *Do you mean that it will have no value?* A. *Absolutely no value to the owner of the building.*" (Italics mine.)

(See also discussion of counsel, p. 265, ll. 10-22.)

In the case of *General Motors Corp.* v. *State Board of Tax Appeals,* 125 N. J. L. 574, a question arose as to the value of certain automobile parts. The Court noted (p. 577):

"* * * No proofs were offered as to the sale value of these parts * * *."

And held at pages 577, 578:

"* * * The statute sets the fair market price as the standard of value but that value may be determined by considering the cost to the taxpayer where, as here, the personalty was bought or manufactured to be used to assemble a finished product. * * *."

In the case of *Underwood Typewriter Co.* v. *City of Hartford,* 99 Conn. 329, 122 Atl. 91 (1923), a situation arose in point here. There a statute, very similar to ours, was construed by the Court. In speaking of "market value" Burpee, J., for the Supreme Court, said:

"The term contains the conception of a market, or conditions, in which there may be found a willing seller and a willing and able purchaser. The phrase connotes selling and buying without constraint or compulsion. 26 Cyc. 819; 3 Words and Phrases (Second Series), p. 301; Century Dictionary. But the trial court has said, and the evidence before us supports its statement, that there was no proof of sales of property similar in kind and size to the plaintiff's property, and that it would have been difficult to find a purchaser of such property about October 1, 1920. Considering the magnitude of this property, its location, its cost, the purpose and use for which it was constructed, adapted, and exclusively occupied, and the impossibility of changing that purpose and use without great loss

or expense, the conclusion is reasonable, if not inescapable, that there was no purchaser at that time who would be able and willing to pay for it any price which its owner could fairly be expected to accept. In fact, at that time there was no market for this property, and it did not have a value which was a fair market value within the proper and approved meaning of the term."

And further (p. 93):

"We had no evidence in the record which establishes a fair market value of the plaintiff's property as that term is commonly understood and is used in the statute. Therefore, we are constrained to hold that the court erred in finding this material fact without evidence. The judgment manifestly based upon a conclusion thus erroneously made must be set aside."

And the Court goes on (pp. 93, 94):

"General Statutes, Sec. 1197, under the heading 'Rule of Valuation,' provides as follows:

'The present true and just value of any estate shall be deemed by all assessors and boards of relief to be the fair, market value thereof, and not its value at a forced or auction sale.'

Evidently the word 'actual' in section 1183 is used in the same sense as the word 'just' in section 1197. It is also evident that the words 'market value' in this statute mean a value in a market, in a place or conditions in which there are, or have been, or will be, within a reasonable time, willing sellers and able and ready buyers of property like that to be assessed, and in which sales are or have been made, or may fairly be expected, in the usual and natural way of business. That the idea of sales and of unconstrained sellers and ready buyers is in the essence of the meaning of the phrase 'market value' is indicated in the terms of the final clause, 'and not its value at a forced or auction sale.' We think therefore, that, without proof of a market of this kind, there could be no proof of a market value."

It is respectfully submitted that there is no market for the property under consideration and that, therefore, opinion as to "sale value" as urged by petitioner is not the basis of "true value" within the constitution.

(b)

Petitioner's Proof of True Value.

But, petitioner contends, its witnesses, Ryer and Stack, testified respectively that the valuation as between a willing seller and a willing buyer was $3,000,000 and $3,160,000.

In so doing, it is submitted, petitioner would have this court follow a "guess" with no tangible foundation and utterly devoid of basis, either in fact or reason.

It is respectfully requested that the entire testimony of the witnesses, Ryer and Stack, be read, for such a perusal will show that the conclusion reached by each was baseless (S. of C., pp. 256-291, 294-298).

In the first place both of petitioner's expert witnesses based their estimates on statements furnished them by the Harborside Warehouse Company (as to Ryer see p. 283, ll. 3-10; as to Stack, p. 297, ll. 22-24; p. 298, ll. 20-26).

But, as Mr. Quimby, who has charge of the prosecutor's accounts, testified at page 250, lines 37-41:

> "Q. So that Exhibit R-3, without a profit and loss account is not accurate? A. It doesn't accurately disclose a profit or loss.
>
> Mr. McCarthy: That is all.
>
> Mr. Hartpense: That is all Mr. Quimby."

How then, could the expert's opinion, based on inaccurate statements, be valid? Further, Mr. Ryer testified that he did not include in the income of the property rent received from the Pennsylvania Railroad Company (S. of C., p. 292, ll. 34-40; p. 293, ll. 1-25), and Mr. Stack used the same

elements as Mr. Ryer (S. C., p. 297, ll. 22-24; p. 298, ll. 20-26) *In fact the Pennsylvania Railroad Company paid no rent even though it used valuable space and facilities* (S. C., p. 175, ll. 34-39; p. 176, ll. 27-39).

Mr. Morrison testified (S. C., p. 181, ll. 39-40 and p. 182, l. 1):

> "Q. Do you receive any rent from the Pennsylvania Railroad. A. No.
> Q. None, for any purpose whatsoever? A. No."

Steam was purchased by the railroad and no rent was paid therefor (S. C., p. 219, ll. 14-16).

Exhibit R-3 shows that rents range from $.25 to $2.16 and indicating clearly that the amount of the rent depended upon whether the tenants were shippers or non-shippers.

That such preferences and practices were used and followed by the Harborside Warehouse Company, Inc., and its predecessor and the Pennsylvania Railroad Company, is conclusively established in Interstate Commerce Commission hearings *Ex Parte 104*, "Practices of carriers affecting operating revenues or expenses.", which matter was first decided by the Interstate Commerce Commission on December 12, 1933, and a subsequent finding in the same cause by a decision on June 8, 1936. In each of these decisions the Interstate Commerce Commission specifically dealt with the Pennsylvania Dock and Warehouse Company and the Harborside Warehouse Company, Inc., and the Pennsylvania Railroad Company, as to warehousing in the property here under appeal. That portion of the decision decided by the Interstate Commerce Commission on December 12, 1933, is annexed hereto and made a part hereof and marked Appendix "A". That portion of the Interstate Commerce Commission's findings decided June 8, 1936, wherein the Harborside Warehouse Company, Inc., and the

Pennsylvania Railroad Company are discussed is annexed hereto, made part hereof and marked Appendix "B".

The findings of the Interstate Commerce Commission in *Ex Parte 104* were substantially considered by the District Court, Southern District of New York, Justices Case, Patterson and Hulbert, wherein the determination of the Interstate Commerce Commission's findings in *Ex Parte 104* were affirmed, 20 Fed. Supp. 273. This determination of the District Court, Southern District of New York, was subsequently appealed to the United States Supreme Court and affirmed in a determination of Mr. Justice Reed, reported 305 U. S. 507 and 59 Supreme Court Reporter, October Term, 1938, at page 284.

Are not these facts elements of the rental value? Yet, neither of the petitioner's witnesses considered them, as their opinions were based on the company's statements (S. C., p. 283, ll. 3-10; p. 297, ll. 23-24; p. 298, ll. 20-26), which of course would not show income from these sources. Thus, the opinions of petitioner's experts, based upon statements which are first inaccurate and secondly incomplete, cannot be considered even if their method of arriving at their conclusions were valid.

But, even that method is in fundamental contravention to the theory of valuation for property taxation under our statutes. Each of the witnesses based his valuation on the sale price of the leasehold (S. C., p. 282, ll. 18-40; p. 297, ll. 22-24. See also argument by counsel, p. 265, ll. 11-23).

It is well settled that the taxing districts are entitled to hold every parcel of realty in its full value to a *fee owner* (see *Becker* v. *Little Ferry*, 125 N. J. L. 141, aff. 126 N. J. L. 338). Carrying the theory of petitioner's witnesses to its logical conclusion would mean that, towards the end of the lease, the property would have no value. That being so would it not be subject to taxation, even though as a bene-

ficiary of municipal service and protection it should share the burden of the expenses thereof. Analogically, if the term of the lease were five years, at the end of that term the leasehold of course would have little if any sales value. Would petitioner's witnesses then say it should not be subject to taxation? Clearly, their theory would lead to absurd results.

Neither of prosecutor's witnesses allocated any value to the improvement or to the land, thus contravening the well established theory of valuation of an improvement alone.

Koch v. *Jersey City*, 118 N. J. L. 85.

As President Quinn says in his opinion below:

> "But, as already noted, the taxpayer herein offered no proof intended or calculated to be directed to the selling value, as between a willing buyer and seller by fair contract at private sale, either of the parcel as an entirety or of the land alone. Nor was there any attempt to show, even by capitalization of income, the value of the improvement to a fee owner thereof. The conception avowedly held by its witnesses of the issue herein, was that of the value of *the particular business enterprise housed in the improvement*, based upon capitalization of net income, but charging against earnings a deduction for a sinking fund to recapture the value of the building during the term of leasehold, because of the reversion of the buildings to the lessor at the termination of the lease, as well as a deduction for rent paid to the landlord. The value thus arrived at for the improvement was $3,100,000. In other words, this valuation was that of the leasehold to the business tenanting the building. This approach fundamentally misconceives the theory of valuation for property taxation under our statutes. The taxing districts are entitled to hold every parcel of realty accountable for taxes in its full true value to a fee owner, and in the amount for which the property could be sold by fair

> sale, unfettered by leases or other restrictions created by private contract. See Becker vs. Little Ferry, 125 N. J. L. 141 (Sup. Ct. 1940). And it does not matter that the assessment was levied against a named taxpayer holding less than a fee interest in the property. Id. at page 144."

Pointedly, with reference to the weight of his opinion as to market value, Mr. Ryer testified that he never sold a storage warehouse of the size here under consideration, that he did not know of any cold storage warehouse properties of this size that have been sold by private contract in Jersey City; that he never built any building of this size, that in fact he was not a builder. He knew of no comparable sales (S. C., p. 276, ll. 1-32; p. 284, ll. 11-40; pp. 285, 286).

Mr. Stack testified that he never sold any buildings of this character, nor did he know of the sale of any buildings of this character. He knew of no sale of any storage warehouse property of this size by private contract in Jersey City or Hudson County. He had never been a builder or contractor (S. C., p. 297, ll. 30-39; p. 298, ll. 1-17).

In short, it is respectfully submitted that petitioner's argument resolves itself to the proposition that simply because its witnesses uttered an *opinion* as to what price a willing buyer would pay a willing seller, that that opinion so given would have bound the State Board. Respondent submits that such figures are nothing more than fanciful guesses, grossly incompetent and baseless, and though petitioner condemns the failure of the City's experts to express opinions as to selling value, it is submitted that they did not do so because no one could, with reason.

Petitioner further contends that the City is bound by the recital in the deed of the Selling Master in bankruptcy wherein the consideration is given as $2,100,000, and says:

> "* * * that the purchasers thereof were the highest and only bidders * * *." (Petition, p. 17.)

That "forced sales" are no criterion needs no citation. That a bankruptcy sale is a "forced sale" is equally true. That the purchasers were the "only bidders" is absolute confirmation of the City's argument heretofore that there was no market for this property and there could not be, nor could there be a sale to any other buyer than one in community of interest with the Pennsylvania Railroad Company. And such a person, the Harborside Warehouse Company, of identical management personnel, was the "only bidder." The fact proves the contention.

Petitioner says in its petition (p. 8)

> "Obviously the purchasers approach the class of 'willing purchasers.'"

Significantly, it is submitted, petitioner does not claim that the sellers even "approach" the class of "willing sellers," and that is as much an element of the rule as "willing purchaser." It is further to be noted that this price was paid *before* the completion of Units 2 and 3.

Petitioner makes much of the fact that its books show that from its inception the Warehouse Company operated at a deficit, and that economic factors, depression, etc., adversely affected its business.

As admitted by petitioner's witness, Mr. Quimby, its books do not accurately indicate the true profit and loss condition (S. C., p. 250, ll. 38-40). Further, the interassociation of the warehouse with the Pennsylvania Railroad Company and the latter's use of space and facilities without rent (S. C., p. 181, ll. 39-40; p. 182, l. 1, and p. 219, ll. 14-16; see also "Appendices 'A' and 'B'" hereto) must be a further prism through which to look at this picture. A perusal of Exhibit P-3, data regarding the rent roll,

will show the range of rents charged to shippers and non-shippers (S. C., p. 409). When thus viewed, the "unhealthy" condition dims.

Further, though petitioner argues that business has progressively become worse, yet the verified petitions of appeal to the Hudson County Tax Board for the years 1935, 1936, 1937 and 1938, each signed by George Morrison, President, under oath, expressly state that progress was made in each of those years in obtaining business (S. C., p. 580, ll. 35-40; p. 581, ll. 1-3; p. 583, ll. 36-40; p. 584, ll. 1-3; p. 586, ll. 36-40; p. 587, ll. 1-3; p. 589, ll. 36-40; p. 590, ll. 1-3). The same statements show that the percentage of rentals between 1935 and 1938 rose some 27.8% (Id.).

Even if a deficit is shown, as was said in *Gibbs* v. *State Board of Taxes*, 101 N. J. L. 371, at page 373:

> "Income is only an element to be taken into consideration where a property is so situated that the yearly rental reflects its true value. It is no criterion for an assessor in making a valuation for the purpose of taxation."

In *Griffith* v. *Newark*, 125 N. J. L. 57, prosecutor had erected a building fifteen stories in height, the lower floors being used as a piano store and warehouse by the Griffith Piano Company, a business operated by the prosecutor. The upper stories were divided into and rented as offices. It was urged that the assessment was too high because rentals did not justify it. The court said at page 58:

> "But it is admitted that the building is out of the ordinary in that the prosecutor constructed it as sort of a monument to himself. That being the case no doubt value was put into the structure on which no adequate return was anticipated. In such a situation, the income obtained from that part of the premises which is rented is assuredly not the sole test of value,

as seems to be the claim of the prosecutor. Vacant land yields no return, yet it could not be argued that such land is without value."

It is respectfully submitted that this warehouse, while not erected as a monument, nevertheless was erected for the express purpose of attracting freight customers to the Pennsylvania Railroad (See I. C. C. report *Ex Parte 104*, Appendix "A" and Appendix "B" hereto) with the thought in mind and in purpose that considerable of its space and facilities were to be used by the Railroad without rent (S. C., p. 181, ll. 39-40; p. 182, ll. 1-2). And such is the fact (S. C., p. 181, ll. 39-40; p. 182, ll. 1-2). Otherwise why would the Pennsylvania Railroad Company *pay* for the completion of Units 2 and 3, as testified by its construction supervisor, Mr. Goldsmith (S. C., p. 155, ll. 30-40).

Truly, the value of the property results from its use, and the use here is not reflected in rental returns, but in the sum value of the building and the value of this Warehouse adjacent to and as auxiliary to the track and waterfront operation of the Pennsylvania Railroad.

The opinion below amply considers the earnings and shows their weak value, with respect to this improvement. The Board had ample evidence of the unreliability of petitioner's books as shown *supra* and ample proof that the rentals do not indicate the "true value" of this particular improvement. The treatment by the Board of the question of earnings forcefully shows the consideration given to the question and the weakness of petitioner's argument in this respect. (See opinion, S. C., p. 71, ll. 20-40; pp. 72, 73.) Certainly, in this case, it cannot be said that "the assessment was made in plain violation of established principles." Rather, it was in accord.

(c)

Respondent's Proof of True Value.

Petitioner, in its brief, criticizes the City's proof below as follows:

> "The only evidence presented by the City before the State Board was the testimony of two witnesses whose figures were confined to construction costs, as of the respective assessment dates, with a slight allowance for physical depreciation and obsolescence, leaving, as they termed it, a "sound value" varying from $6,100,500.00 to $7,226,800.00, according to the testimony of the City's witness, Mr. Robertson (Record, p. 89, ll. 27-40), and from $6,049,887.98 to $7,063,742.84, according to the City's witness, Mr. Phillips (Exhibit P-1, Record, p. 112, l. 1; p. 316, ll. 3-6)." (Petition, p. 9.)

This point, in varying language, is reiterated throughout the petition. As, for instance:

> "Cost of reproduction, less a slight allowance for depreciation and obsolescence, alone was considered." (Petition, p. 11.)

Now, in fact, cost of reproduction less depreciation and obsolescence, was by no means the only evidence, as will be shown *infra*.

However, petitioner goes on to criticize cost of reproduction as evidence and cites the cases of *C. R. R. Co.* v. *State Board*, 49 N. J. L. 1; *Schetty* v. *Jersey City*, 18 Misc. Rep. 37; *Universal Insurance Co.* v. *State Board*, 118 N. J. L. 538; *The Borough of Bradley Beach* v. *State Board*, 124 N. J. L. 36.

The cases cited are not applicable to the case here under consideration. In each of the cases there was involved

assessments which included land and improvements and there is no dispute as to the law in such a situation, the test undeniably being the true market value but in this case, as in *Newark* v. *Timer*, 12 N. J. Misc. 125, the appeal is only as to the improvement and, therefore, testimony must be directed to the valuation of the building. In each of the cases cited, the situation was entirely different than in the case at bar. In each of the cases cited, the taxpayer was the owner of the land and the improvement, both were under appeal. In the case at bar, title to the land is held by the Pennsylvania Railroad, assessed by the State Tax Commissioner, title to the improvement is in the Warehouse Company and assessed locally.

In each of the cases cited, the property was of ordinary character, readily salable on the open market, whereas the property here under appeal is unique in character, not readily salable and the land and building could not be sold by any one party.

However, a full quotation of the language of Chief Justice Beasley in the case of *C. R. R. Co.* v. *State Board*, will show the true import of the decision (at pp. 5, 6):

> "But it is again objected that the state board, in estimating the value of these roads and structures, took, as the absolute standard of value, either the original cost of acquisition and construction, less wear and tear, or the cost of reproduction.
>
> We think this premise is not to be conceded, for there is no evidence from which it can reasonably be inferred, that so fallacious a measure of value was adopted. It is common knowledge that what a thing has cost is no infallible criterion of its market value; it is therefore to the highest degree improbable that the officers composing this board, who have manifested, so conspicuously, both capacity and knowledge with reference to the multiform and intricate subjects embraced in these suits, could have fallen into an error so utterly puerile.

> *That the Board ascertained the cost of acquisition and construction is beyond doubt; it could scarcely perform its function intelligently without doing so, for such cost, though not an incontestable evidence of exchangeable value, is nevertheless almost always an important particular* in the mass of circumstances laying the basis of a rational judgment touching the value of anything as an article of sale. That the state board used cost in the way thus indicated is clear, but it is not shown that it was used as an absolute measure. The inference drawn by counsel, that because the cost as ascertained and proved by the engineers who were the witnesses called by the state very often agrees in amount quite closely with the valuation found by the board, therefore the standard of cost was adopted by the board is, we think, not warranted. Such approximations between these respective valuations were to be expected, *for no reason is perceived why the property of a successful railroad is not worth about the sum that it would cost to replace it, allowance being made for its depreciation from use.*" (Italics mine.)

So here, the Board did not consider cost of reproduction alone (see Opinion of Quinn, Pres., S. C., pp. 63-73) and as will be specifically pointed out *infra*.

Likewise the *Schetty* case, cited by petitioner, merely reiterates that reproduction cost is not an *exclusive* test. The City does contend that it is exclusively so.

The case of *Atlanta B. & O. Ry. Co.* v. *United States*, 296 U. S. 33, is not at all in point. It concerns itself with valuation for "accounting purposes" under the rules of the Interstate Commerce Commission. Those rules as the court points out at page 35:

> "* * * provide generally that the investment account shall show the 'actual money cost to the accounting carrier' * * *."

Such is not the test here.

The principle stated in *Universal Ins. Co.* v. *State Board*, 118 N. J. L. 538, that only under "ordinary or normal conditions" is "market value" workable is precisely the City's contention. This is *not* an ordinary or normal condition. This is a condition identical with the situation presented in *Jersey City* v. *Seaboard Terminal, etc., Co.*, 19 Misc. Rep. 178, writ denied, where the warehouse was on land leased from the Erie R. R. and wherein it was said, at page 182:

> " * * * yet where structures of unique character, not usually sold in the real estate market, are involved, as here, resort to consideration of the physical constituents of the building and their cost may be justified * * *."

As said in the *Universal* case:

> "Taxation is an intensely practical matter * * *. It is an intense reality."

Thus soundly does Judge Burpee say in *Underwood Typewriter Co.* v. *City of Hartford* (*supra*):

> "*But it does not follow that, when the tax assessors cannot ascertain the market value of certain property, they cannot determine the valuation of that property for legal taxation.* If the rule of taxation provided by statute cannot be applied, the law still commands, that all property liable to taxation shall be put in the owner's list at its present true and actual valuation. *The general law is not nullified or modified by the particular statute which lays down a rule of valuation. But the law never requires the impossible. Hence, if the rule indicated cannot be followed, other means must and may be found by which the assessors can perform the duty the law has put upon them.* One of the means which have been approved and sometimes used is to ascertain the original cost of construction and improvement, deducting therefrom depreciation, and adding the increase in cost of materials and labor, if at

> the time of valuation there is such increase over the cost at the time of construction. *Another method frequently adopted is to determine what it will cost to reproduce the plant, or the cost of replacement at the time of valuation, and to deduct therefrom for depreciation in the existing plant.* Both methods may be and have often been resorted to and considered in fixing present true and actual value. Pioneer Telegraph & Telephone Co. v. Westonhaver, 29 Okl. 429, 118 Pac. 354, 38 L.R.A. (N.S.) 1209. But the result of neither should necessarily be taken as the invariable measure of value. Either method and its result when reasonably applied may be of service in ascertaining the actual value. Smyth v. Ames, 169 U. S. 466, 547, 18 Sup. Ct. 418, 42 L. Ed. 819; Minnesota Rate Cases, 230 U. S. 352, 452, 33 Sup. Ct. 729, 57 L. Ed. 1511, L.R.A. (N.S.) 1151, Ann. Cas. 1916A, 18." (Italics mine.)

And, as was said by the Supreme Court of New York in the case of *Hotel Astor* v. *Sexton,* 287 N. Y. Supplement, 746, wherein the building in question was on leased land:

> "Under the circumstances, no other means appear to be available for fixing the value of the building itself as distinguished from the land. The reproduction cost thereof should enter into the consideration."

The precise method of proof used here was used in *Jersey City* v. *Seaboard Terminal, etc., Co.* (*supra*). As is said in that case at page 182 of 19 Misc.:

> "Petitioner's proofs were primarily based upon depreciated replacement cost of the building, both from the standpoint of cubic foot units and of detailed quantity survey. * * *."

And the assessment was upheld and, on application for a writ of certiorari was denied by the Supreme Court with the comment that "no fairly debatable question of law or fact is presented."

Thus the City produced two qualified witnesses as to the reproduction cost of the buildings less depreciation and obsolescence. Mr. Robertson placed a value as of October 1, 1934, of $6,100,500 (S. C., p. 89, ll. 20-29); as of October 1, 1935, $6,194,400; as of October 1, 1936, $6,502,000; as of October 1, 1937, $7,226,800 (S. C., p. 89, ll. 29-39).

Mr. Phillips, after making a quantity survey, placed the true value as of October 1, 1934, at $6,049,887.98; as of October 1, 1935, at $6,153,600.26; as of October 1, 1936, at $6,420,194.31; as of October 1, 1937. (Exhibit P-1; p. 316, ll. 1-6.)

These valuations do not, however, as prosecutor says, stand by themselves. They are confirmed, and in fact shown to be moderate, by these very pertinent elements in the record:

a. The original lease between the Pennsylvania Railroad Company and the predecessor of prosecutor was expressly conditioned upon erection by the lessee of buildings described therein in terms corresponding to the buildings actually erected, which were to cost $8,536,000. (Ex. P-2; S. C., p. 378, ll. 12-30.) *This same element was considered in the Seaboard case (supra) at p. 182.* There is nothing to show that those terms were not carried out.

b. The same lease provided for the execution by the lessee of bonds in the sum of $7,000,000 conditioned upon the completion of the buildings, tunnel, driveway and ramp. (Ex. P-2, S. C., p. 380, ll. 1-16.)

c. On October 23, 1933, the Board of Directors of the Harborside Warehouse Company, Inc., approved the issuance of two mortgages and deeds of trust one in the amount of $2,500,000 a forty-year leasehold mortgage and deed of trust and the issuance of a mortgage and deed of trust in the sum of $5,750,000 to secure 40 yr. income bonds. (Ex. R-4, p. 461, ll. 28-35.)

d. The Warehouse Company carried these buildings on its own books at the following values on the respective dates:

September 30, 1934—$7,350,000.00 (Ex. R-4; p. 417);
September 30, 1935—$7,409,773.70 (Ex. R-4; p. 417);
September 30, 1936—$7,459,197.32 (Ex. R-4; p. 504);
September 30, 1937—$7,345,703.16 (Ex. R-4; p. 504).

And these dates are respectively only one day before the assessing dates here under consideration.

Petitioner seeks to minimize the probative weight of the book values, and cites the case of *Hackensack Water Co.* v. *Haworth*. Of that case petitioner says (petition, p. 31):

> "President Quinn pointed out that it (book value) had no controlling value or effect, even where it was admitted by the taxpayer that it represented valuation for all purposes, and not peculiarly for rate-making purposes."

An examination of the opinion therein reveals that the language quoted is by no means the holding of the case. In fact, the book value was therein rejected because as the opinion says (at p. 221):

> " * * * *the borough fails to demonstrate that any particular part of the total book figure is appropriately apportionable to the Haworth land.* The total includes the cost of the dam, all of which is situated in the Borough of Oradell. This dam, with its accompanying structures, which are assessable as improvements (Hackensack Water Co. v. Borough of Woodcliff Lake, New Jersey Tax Reports, 1934-1939, p. 145), have been alone assessed for taxation by the Borough of Oradell at a valuation in excess of $2,000,000. It is thus apparent that introduction of the book value of the whole reservoir has not been made probative of the true value of that portion thereof consisting of the land situated in Haworth." (Italics mine.)

Thus, the book value therein failed to show the value of the land in question, namely, that in Haworth.

The cases of *Woodcliff Lake* v. *State Board*, 14 Misc. 132; *Hackensack Water Co.* v. *State Board*, 122 N. J. L. 596; *Haworth* v. *State Board*, 127 N. J. L., and *Universal Ins. Co.* v. *State Board*, 118 N. J. L., are not in point here, for the book value herein was not for rate-making purposes (S. C., p. 213, ll. 21-39; p. 214, ll. 1-22). Either the book value here is true value or is set up as a fraud.

Rightfully then have our courts established book value as a strong criterion of value. As was said in *General Motors Corp.* v. *State Board of Tax Appeals*, 124 N. J. L. 212, at page 213, aff. 125 N. J. L. 574 (Court of Errors and Appeals):

> " * * * The board could hardly have accepted a valuation which would treat such personal property as of less value than prosecutor's own inventory. * * * "

In this respect, the decision in *Jersey City* v. *Seaboard Terminal, etc. Co., supra*, exactly comparable to the case *sub judice*, is conclusive:

> "*Since our courts have considered book value as a persuasive factor in determining statutory true* value (Second National Bank and Trust Company of Red Bank v. State Board of Tax Appeals, 114 N. J. L. 573; 178 Atl. Rep. 96; General Motors Corp. v. State Board of Tax Appeals (Supreme Court, 1940), 124 N. J. L. 212; 11 Atl. Rep. (2d) 314), *this evidence weighs in favor of the taxing district's contention to the effect that the original assessment was not excessive, and this particularly in view of the absence of direct and reliable proof of the selling* value of the building." (Italics mine.)

And the book value of petitioner, for each year, was at least $2,300,000 *more* than the assessment as revised by the State Board.

Appendix "A".

Excerpt from Interstate Commerce Commission decision, *Ex Parte No. 104,* decided December 12th, 1933.

PENNSYLVANIA DOCK & WAREHOUSE COMPANY

The Pennsylvania Dock & Warehouse Company, hereinafter termed the warehouse company, was incorporated under the laws of the State of New Jersey on February 4, 1929. On August 20, 1929, the Pennsylvania leased to the warehouse company a parcel of land in Jersey City containing 377,400 square feet. The Pennsylvania joined with the warehouse company in the construction of the leased land of a modern warehouse and cold storage plant, consisting of three units. Unit No. 1 was to be devoted to cold storage and Units Nos. 2 and 3 to a general warehousing business. The Pennsylvania advanced large sums of money toward the construction of the project, and went to considerable expense in clearing ground and replacing track and float bridges located on the property to be used as a site for the proposed warehouse. Consideration had been given to such a project for the past 20 years, but the movement had not gained momentum until the prosperous era of 1924 and 1925.

The warehouse is of reinforced concrete construction, equipped to render complete service, including cold storage, pool-car distribution, bonded warehousing, warehousing on a package basis, and general warehousing. The complete unit extends 970 feet on the waterfront and is 320 feet in depth. It is served with seven Pennsylvania sidings, three tracks entering unit No. 1 and two tracks entering unit No. 2 and unit No. 3. The main trucking entrance is a concrete drive 60 feet wide. Shipments can be handled direct from lighters and steamers.

The lease runs for 21 years, at an annual rental of $50,000 for the first 11 years, with a subsequent rental to be fixed at 5 per cent of the value of the land as determined at the end of 11 years. Common use of considerable of the property was provided for. The lessee has the option of renewing the lease for two additional terms of 21 years each. The lessee is to pay all taxes, assessments and duties. The lessee was to construct a warehouse and cold storage building at an approximate cost of $6,756,000 and $1,780,000 respectively. The Pennsylvania controlled every important detail in the construction of the warehouse. The lease provides in part:

> The said warehouse buildings * * * shall be constructed of material and in accordance with plans and specifications to be approved by the parties hereto, * * * and the lessee shall deliver to the lessor within six (6) months after the completion of the said structures a complete statement in such form and detail as the lessor shall require, verified by affidavit of the President of the lessee of the amount expended by lessee in the construction thereof.

The lessor required the lessee to furnish a bond, in the amount of $7,[illegible] providing for construction and completion of the facilities to the satisfaction of the lessor and at the times provided in the agreement. Failure of the lessee in any of these respects forfeited the bond to the lessor, and conferred upon the lessor the right to complete construction of the facilities. The lessor not only controlled every detail of construction, but dictated the rights of the lessee to place mortgages on the premises, and provided that the lease should not be assigned without prior consent of the lessor. The privilege of subletting any portion of the warehouse buildings was also covered by the agreement.

The lease further provided that the lessee will give preference to traffic passing over the lessor's railroad lines and that the warehouse building will not be used for any purpose inimical to the lessor, and that if the proper relationships between lessee and lessor cannot be brought about, the lessor may recapture the entire property under certain terms and conditions. The Pennsylvania secured an interest in the warehouse company through the purchase for cash of junior bonds of the warehouse company, aggregating $1,500,000, which were subordinate to the first mortgage bonds of $5,750,000. As security for further advances to the warehouse company, the Pennsylvania obtained additional junior bonds of the warehouse company amounting to $1,300,000. To complete the construction of the building the Pennsylvania advanced an additional $1,316,000. The Pennsylvania, therefore, contributed $4,116,000 directly to this warehouse project, which is constructed on its lands valued at $1,132,200, the two totaling $5,248,200. No rent for the land and interest on the $5,116,000 had been paid. The warehouse company has been in receivership since July, 1931.

Other expenditures by the Pennsylvania in furtherance of the construction of this warehousing project were for the new piers. Pier D cost the carrier $1,645,000 and Pier F $1,825,000. Total investment in connection with piers and warehousing facilities was $9,000,000, a large part of which was the expense of removing old facilities to clear the site.

GENERAL COLD STORAGE COMPANY.

The General Cold Storage Company was incorporated under the laws of New Jersey on July 31, 1929. It has operated Unit No. 1 of the Pennsylvania Dock & Warehouse Company as a cold storage plant since September

14, 1930. Differences arose as to what rent it was to pay, and up to July 16, 1931, it paid $28,000. No rental has since been paid, and no formal agreement as to the rental has been executed, although the monthly rental was understood to be $24,791.42. Although no rent was paid for the use of these facilities, the General Cold Storage Company's income statement for the year ended December 31, 1931, showed a deficit of $2,247.35.

The traffic officials of the Pennsylvania took an active part in the selection of an operator for the cold storage facilities in connection with this warehouse project.

It appears clear that the interest of the Pennsylvania in the warehousing and storage facilities was to meet the storage rates of its competitors. Although the Pennsylvania denied it has taken any part in the operation of the warehouse company, and claims it is not in the cold storage business, the evidence shows a very close relationship between the operating companies and that carrier.

Appendix "B".

Excerpt from Interstate Commerce Commission Decision, *Ex Parte No. 104,* decided June 8, 1936.

THE PENNSYLVANIA RAILROAD COMPANY

Pennsylvania Piers. The Pennsylvania continues to operate piers described at page 162 in the prior report. Changes have been made since the issuance of that report with respect to flour traffic and the charges for storage of goods under so-called "storage-in-transit" arrangements. Both of those subjects are later discussed.

Harborside Warehouse Company. The Harborside warehouse was originally planned to attract competitive traffic to the Pennsylvania. Although it was not the intention

of the Pennsylvania to operate the warehouse directly—and it does not propose to do so in the future—no important part of the planning, financing, refinancing, or operation of the building has been or is conducted, except under the domination or at least the direction of the Pennsylvania. The subsidiary companies involved are shown below, and the record is entirely conclusive that the warehouse operations are part of the Pennsylvania's general railroad operations, and at the most, the former are separated from the latter only by an imaginary line.

The building now occupied by the Harborside Warehouse Company was formerly occupied by the Pennsylvania Dock & Warehouse Company and General Cold Storage Company, and is discussed in the prior report, beginning at page 165. We there found *inter alia*, that on August 20, 1929, the Pennsylvania leased to the Pennsylvania Dock & Warehouse Company, hereinafter termed the warehouse company, or the bankrupt company, a parcel of land in Jersey City containing 377,400 square feet, on which the lessee was to construct a warehouse and cold-storage building at an approximate cost of $6,756,000 and $1,780,000, respectively; that the Pennsylvania controlled every important detail in the construction of the warehouse and contributed $4,116,000 directly to the project, which was constructed on the carrier's land valued at $1,132,200, the two totaling $5,248,200; that no rent for the land or interest on the $4,116,000 had been paid; that other expenditures were made by the Pennsylvania in furtherance of the construction of this warehousing project, namely, for two piers costing $1,645,000 and $1,825,000, respectively; that the total investment in connection with these piers and warehousing facilities by the Pennsylvania was approximately $9,000,000, a large part of which was the expense of removing old facilities to clear the site;

and that the warehouse company had been in receivership since July, 1931.

We further found that the General Cold Storage Company had operated Unit No. 1 of the warehouse building as a cold-storage plant since September 14, 1930, and that although no rent was paid for the use of these facilities after July 16, 1931, that company's income statement for the year ended December 31, 1931, showed a deficit of $2,247.35; and that although the Pennsylvania denied it had taken any part in the operation of the above companies, and claimed it was not in the cold-storage business, the evidence showed a very close relationship between the operating companies and that carrier.

At the further hearing it developed that while foreclosure proceedings instituted by a bondholder's committee were pending, officials of the Pennsylvania conferred with that committee with respect to the situation, and on January 24, 1933, a plan of reorganization of the warehouse company was jointly adopted by that committee, the Pennsylvania, and the American Contract and Trust Company, hereinafter called the trust company, a wholly-owned subsidiary of the Pennsylvania. Under that plan a new company, called the Harborside Warehouse Company, Incorporated, was formed to acquire and operate the warehouse. The trust company agreed to provide the new company with an aggregate of $1,500,000 in cash to pay accrued taxes and expenses of reorganization, to provide working capital, and to absorb losses which under then-present conditions it was expected would occur in the operation of the property. For this purpose it agreed to purchase, or cause its nominee to purchase, from the Harborside Company from time to time on demand, not exceeding an aggregate of $1,500,000 of the principal amount of an authorized $2,500,000 issue of new 40-year six per cent leasehold mort-

gage bonds. In consideration of this the trust company was to receive from the bondholders' committee the entire capital stock of the new company to be outstanding at the completion of the reorganization.

Under the reorganization plan the Harborside Company was authorized to issue $5,750,000 of 40-year 6 per cent income bonds, junior to the new leasehold mortgage bonds; holders of the leasehold mortgage bonds of the bankrupt company could exchange their bonds for the new income bonds; or the trust company would purchase or cause to be purchased by its nominee all bonds of the bankrupt company at 35 per cent of their face value. The plan also provided that the Pennsylvania would make an agreement with the Harborside Company to complete, or cause to be completed, the construction of the warehouse and cold-storage plant without cost to the Harborside Company, and that the Pennsylvania would modify or supplement the lease described in the prior report so that the term would extend beyond the maturity date of the mortgage bonds and income bonds of the new company.

The reorganization plan was put into effect, and the reorganization committee purchased for $2,100,000 at a bankruptcy sale on September 27, 1933, all of the property and assets of the bankrupt company. It also purchased for $3,500 all of the assets of the cold storage company. The Harborside Company, whose principal officials are likewise officials of the Pennsylvania, was incorporated in New Jersey on September 30, 1933, and on October 23, 1933, at a meeting of its board of directors, the reorganization committee assigned to the new company all its right, title, and interest in and to their bids at the sale. The board of directors also authorized the issuance of the above-mentioned bonds. The trust company spent about $1,300,000 in buying some of the first mortgage bonds of the bankrupt com-

pany at 35 cents on the dollar, and secured a loan of about $1,700,000 in cash from the Pennsylvania before completion of the warehouse. The General Cold Storage Company was dissolved in June, 1934.

As a result of the above transactions, the Pennsylvania through its subsidiary trust company now owns the building, which was built at a cost of between $8,000,000 and $9,000,000. The property was purchased under foreclosure for $2,100,000 and the Pennsylvania has invested a total of between $7,000,000 and $8,000,000 in the project. At the time of the further hearing, suit had been brought by the Pennsylvania to recover $5,000,000 from the surety company which guaranteed completion by the bankrupt company of the building.

The Harborside Company building, equipped with a steam plant and an extensive refrigeration plant, is now operated as a commercial warehouse. It contains about 1,750,000 square feet of space used for dry storage and about 350,000 square feet used for cold storage. Considerable space of both kinds is used by the Harborside Company for its storage operations, which include all of the incidental services necessary in conducting a competitive commercial warehouse business. Such space is charged for on a square-foot basis or in some instances according to the weight of the articles stored. The services, such as handling and marking the goods stored, which in most or all cases are owned by shippers in interstate commerce, are charged for on a man-hour basis. The warehouse does not operate a distributing or trucking service, but will arrange for such service for its customers. No pool cars have been handled to the present time, as at some other railroad-owned or controlled warehouses in New York, for the reason that the Harborside Company has not considered that business desirable. Space is also rented on a

square-foot basis to tenants, most or all of whom are also shippers in interstate commerce, whose business necessities require them to store, manufacture, blend, pack or perform a similar trade process on the goods handled.

During the life of the National Recovery Administration, the storage operations of the warehouse were conducted in accordance wtih the warehousemen's code, and the basis for charges under the code were continued to the time of the further hearing. While it does not appear from the record that this respondent has indulged in price cutting on storage or space rented to the same extent as other respondents, it is clear that under some circumstances it engages in practices which offer opportunities to defeat requirements of the act. Among such practices are alterations made in space rented to shippers in order to fit the needs of the particular business in which the shipper engages. Free rental for a period of time at the beginning of a lease term is in some cases allowed, the amount of time for which no rental is collected apparently being governed by the desirability of the tenant from a landlord's standpoint. While it is not customary to do so, in one instance of record money was advanced to shippers to pay general freight and custom charges and in several instances charges for storage were not collected when due. In those cases respondent claims to have been amply secured because the value of the stored goods was greatly in excess of the past-due storage charges.

Under the above circumstances, the extent of the services performed by the Pennsylvania for its shipper tenants must vary from time to time, and as a result the compensation received by that respondent for a given service likewise varies. Such arrangements are contrary to the principles of the act.

The rates charged for rental space such as has been previously discussed range from 40 to 70 cents per square foot per annum. It was testified on behalf of the respondent that in fixing the rates for storage and rental the out-of-pocket costs were obtained, but it was developed that such costs did not take into account charges for depreciation on the building or on the refrigerating and similar machinery used in conducting the operations. The value of the building is carried on the books of the Harborside Company as $7,350,000. An exhibit of record shows that the net income of the Harborside Company for the seven months period ended April 30, 1935, was $18,800.71. If depreciation at 2 per cent on the book value of the building had been charged a net loss of $66,949.29 would have resulted. The reason advanced for the failure to include depreciation as an element of cost was that the property was acquired by the Pennsylvania at a price far below its real value and capitalized in such a way that it was unnecessary to take into account a depreciation charge.

We cannot too strongly condemn such accounting methods when used by carriers subject to the act to arrive at costs of services sold to shippers, the value of which affects or determines the charges for transportation. In *Winston-Salem Southbound Ry. Co.*, 84 I. C. C. 581, 583, we said:

> Depreciation has been defined by us as the "lessening in worth of physical property due to use or other causes." Each of the components of perishable property must at some time end and as each unit ages, its service capacity also lessens in value. Potential use is limited or curtailed by the length of time property or any of its parts has seen service and a consequent diminution in value ensues.

We have likewise held that the service life of any piece of property which is subject to depreciation begins to de-

crease from the time it is put in service. *Augusta Northern Ry.*, 125 I. C. C. 14. It is unnecessary to cite further cases to support these statements.

Summary of Principal Findings of Fact.

1. The Pennsylvania, through a wholly-owned subsidiary, owns and controls the Harborside Warehouse Company. No important activity of the Harborside Warehouse Company is conducted except under the domination, or at least the direction of the Pennsylvania officials.

2. The Harborside Warehouse Company is engaged in the commercial warehouse business. It and other warehouse companies in the Port of New York district compete for the storage of goods transported in interstate commerce by the Pennsylvania.

3. The Pennsylvania does not set up as an element of the cost of operation of the Harborside Warehouse Company the depreciation charges on the building it occupies. Depreciation is one of the elements of cost in the operation of a warehouse.

We find that in determining the out-of-pocket costs of providing warehouse space for shippers in interstate commerce, the Pennsylvania must take into account as an item of expense the depreciation on its warehouse buildings and facilities used and owned directly or indirectly by it, and that failure to take into account all proper costs in providing warehouse or storage space for shippers in interstate commerce constitutes a device to provide such space at less than cost, and thus evade the provisions of Sections 2, 3, and 6 of the Interstate Commerce Act.

(21)

United States Supreme Court

Nos. 677, 678, 679, 680.
October Term, 1942.

HARBORSIDE WAREHOUSE COMPANY, INC., a corporation, *Petitioner,*

vs.

THE CITY OF JERSEY CITY, a municipal corporation, and THE STATE BOARD OF TAX APPEALS, OF THE STATE OF NEW JERSEY.

On Application for Writ of Certiorari.

(1935 Tax)

HARBORSIDE WAREHOUSE COMPANY, INC., a corporation, *Petitioner,*

vs.

THE CITY OF JERSEY CITY, a municipal corporation, and THE STATE BOARD OF TAX APPEALS, OF THE STATE OF NEW JERSEY.

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On Application for Writ of Certiorari.

(1938 Tax)

On Petition for Writ or Writs of Certiorari to the Court of Errors and Appeals of New Jersey

REPLY BRIEF OF PETITIONER

JOHN A. HARTPENCE,
Counsel for Petitioner,
15 Exchange Place,
Jersey City, N. J.

United States Supreme Court

Nos. 677, 678, 679, 680.

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On Petition for Writ or Writs of Certiorari to the Court of Errors and Appeals of New Jersey

REPLY BRIEF OF PETITIONER

The specific point of Petitioner's present application to this Court for certiorari is, that Petitioner was denied due process of law (and concomitantly the equal protection of the laws), by the action of the State Board of Tax Appeals of New Jersey (sustained and approved by the judgments of the Supreme Court and the Court of Errors and Ap-

peals), in disregarding the only legal evidence produced before it, in ignoring and failing to apply the established law pertaining to the issues involved, and in basing its judgments upon a mere personal visit to and inspection of the taxpayer's property and fixing an independent and arbitrary valuation of it as the basis of a tax imposition, without notice of such action to Petitioner or granting it a hearing respecting it, thereby essaying to exercise an assessing power or function which it did not possess, and, in the exercise of that non-existent power or function, failing to give the taxpayer notice of such action or to afford it an opportunity to be heard regarding it prior to judgment.

This is all so clearly pointed out in our Petition and Supporting Brief and at such length and with such particularity that repetition thereof here would not be justified. But that particularity in the Petition was deemed essential to a clear presentation of the issue and of the Federal question involved, and to show that there is much in the record to substantiate the proposition that Petitioner was subjected to arbitrary "discriminatory taxation", which Respondent seeks to disavow at page 2 of its Brief.

Respondent passes over the real point in issue, and fails to meet or refute the situation asserted by Petitioner as a denial of its fundamental rights under the law of the land, just as the State Board ignored them and as the Supreme Court and the Court of Errors and Appeals, it is respectfully submitted, also failed to effectively consider them.

Respondent, at page 2, also argues that Petitioner does not show that it is harmed by the action complained of.

In other words, *after* a judicial tribunal has prejudged the case, without affording the parties a hearing, the parties are not at liberty to object to such an astonishing procedure unless it be shown that injury resulted therefrom.

But this is quite in keeping with Respondent's position, and with the circumlocution of fact, law and procedure to

which Petitioner claims it has been subjected, throughout, as demonstrated by the Tax History, the Testimony, the Statutes, and the Judicial Authorities reviewed and outlined in our Petition and Brief, and it entirely ignores the judicial expressions of this Court and of the New Jersey Courts cited and quoted therein. It is not the *magnitude* nor the *extent* of the denial of a constitutional right that condemns it, but the *fact* of such denial. This is clearly pointed out in the opinions of this Court and the authorities cited and quoted at pages 49-56 of our main Brief, as well as in the opinions of the New Jersey Courts cited and quoted at pages 40-48 of the Brief, and here submitted in the appendices.

Respondent, at page 2, also stresses the proposition that "whether or not a state tribunal may view property which is the subject matter of controversy as to value, is wholly a matter of state law, and that a determination by the state courts of that question, one way or the other, does not involve any infringement of the Fourteenth Amendment". This, it will be recalled, was also referred to in the Supreme Court's opinion (Record, p. 606).

Nevertheless, it may not be inappropriate to note that the Court of Errors and Appeals reversed a judgment based upon such a view in *Garland* v. *The Furst Store*, 93 N. J. Law, 127. The appropriate portions of the Court's opinion are quoted, for the convenience of the Court, in the Appendix B of this Reply Brief.

The opinion of the Supreme Court, in *Rich* v. *Inter-City Transportation Company*, 11 N. J. Misc. Rep. 243, 165 Atl. Rep. 296 (not otherwise officially reported) is also quoted in full in Appendix C.

And, in Appendix A, is printed in full the opinion of the Supreme Court in the case of *Duke Power Company* v. *State Board of Tax Appeals et al.*, decided February 10, 1943, (not yet reported), after the filing of our Petition herein on

January 29, 1943, which, in reversing the judgment of the State Board (*20 N. J. Miscl. Rep. 240,* cited at page 2 of our Petition) expresses with emphasis its disapproval of the action of the County Board, as a Special Tax Tribunal, in proceeding without a hearing, points out that "the procedure before the State Board was no substitute for a proper proceeding before the County Board," and sustains the very proposition which Petitioner contends for, and which it was denied, in the instant case.

It so completely argues and sustains Petitioner's present contention that it is deemed appropriate to submit it to this Court as illustrative of the application in that case of the exact principle denied Petitioner. What could more adequately and completely demonstrate that Petitioner might well be justified in feeling that it "was thus selected for discriminatory treatment," deprecated at page 5 of Respondent's Brief?

The cases speak for themselves, and show to what extent the principles there enunciated were departed from in the instant case.

It should also be noted that Appendix A and Appendix B to Respondent's Brief, and discussed therein (pp. 31, 40-50), constitute excerpts from a document which is no part of the Record (Record, p. 130).

The Federal Question was made in the Courts below and there ruled adversely to Petitioner (Record, pp. 74, 77-81; 608, 611-615).

It is respectfully submitted that the prayer of the Petition should be granted.

JOHN A. HARTPENCE,
Counsel for Petitioner,
15 Exchange Place,
Jersey City, N. J.

APPENDIX A

OPINION.

(Filed February 10, 1943.)

NEW JERSEY SUPREME COURT

No. 219 OCTOBER TERM, 1942.

DUKE POWER COMPANY,
Prosecutor,

v.

STATE BOARD OF TAX APPEALS OF THE STATE OF NEW JERSEY and HILLSBOROUGH TOWNSHIP,
Defendants.

Argued October 1942 Decided 1943

On Certiorari

1. A corporation chartered by this State but not doing business here is not subject to taxation upon intangibles in another State where taxes have been assessed upon them and have been paid within the time fixed by law. N. J. S. A. 54:4-3.2.

2. A county board of taxation must act judicially when there is a complaint that specified property has been omitted from the assessment lists.

3. Due notice of the complaint must be given to the owner of the property claimed to be omitted.

4. There must be due examination of the complaint and due consideration of the claims of the owner and a hearing before judgment may be entered.

Appendix A

For the prosecutor, Pitney, Hardin & Ward, Shelton Pitney

For defendants, W. Eddy Heath, Frederick C. Vonhoff, Edward R. McGlynn, Joseph Weintraub.

Before Justices Bodine, Heher and Perskie.

BODINE, *J.* This writ brings before us for review a judgment of the State Board of Tax Appeals dated June 2, 1942, fixing an assessment against the prosecutor's intangibles in Hillsborough Township, Somerset County of $11,604,815.44, for the tax year 1939. The case was before the State Board on an appeal from a determination of the Somerset County Board of Taxation fixing an assessment of $8,143,159, and an amended assessment of $21,953,125. These assessments had been made on November 18, 1940, and November 22d, 1940, respectively, under circumstances to be hereafter related.

The jurisdiction of the County Board is challenged as it may well be, even though an appeal was taken to the State Board. Further, if the County Board lacked jurisdiction on the merits so did the State Board. Oradell v. State Board of Tax Appeals, 125 N. J. L. 37.

The State Board's judgment contained a finding that on the tax date, October 1, 1938, the prosecutor possessed the following intangible personal property of the values stated:

Cash in banks	$6,364,430.58
Cash on hand	11,962.35
Notes, accounts and interest receivable	5,005,460.21
Stocks in foreign companies	5,834,705.08
Bonds of other companies	83,079.00
Bonds of North Carolina and of municipalities therein	151,845.65

Appendix A

The prosecutor is a New Jersey corporation and on the tax day in 1938 had its chief office in Hillsborough Township, Somerset County. Its charter prohibits any activities in this state. Its only property in this state are the transfer and stock books which must be kept here. All of the intangible property was secured and used in the course of business in the states mentioned. The transmission lines and plant are operated from a main office in Charlotte, North Carolina, and all its property is taxed under the Machinery Act of that state—a tax upon intangibles. The real and personal property situate in each state was also taxed. The intangibles were, of course, subject to taxation in this state if they do not fall within the exemption provided under N. J. S. A. 54:4-3.2. Newark Fire Ins. Co. v. State Board of Tax Appeals, 118 N. J. L. 525; N. J. Insurance Co. v. State Board of Tax Appeals, 119 Id. 245.

The proceeding originated in a letter to the Township Committee suggesting that personal property of a large corporation was not being taxed for the year 1939. The charge was made July 10, 1939. The writer was employed on a percentage basis to bring in the taxes. Thereafter, the Township Collector made complaint to the Somerset County Board of Taxation of the omission from the assessment of intangible personal property as follows: "Cash, $5,602,-986.00; Accounts, Notes and Interest Receivable, $5,268,663; Municipal Bonds, $246,308.00; Stocks, Bonds and other investments, $6,480,313; Deferred Charges, $75,607.00." From the complaint on prosecutor's motion all items save "cash" were struck. This action finds support in Newark v. Essex County Board of Taxation, 127 N. J. L. 527. The provisions of N. J. S. A. 54:4-15 do not apply to cash in this state, if there was any, since it is exempt under N. J. S. A. 54:4-3.23. MacPherson v. State Board, 127 N. J. L. 599.

Appendix A

On November 13, 1940, the county board heard the case on the "cash" items. However, on November 18, 1940, by resolution at an ex parte hearing, it fixed an assessment on the basis of estimates of the value of intangibles made by certain persons who made affidavits. On November 22, 1940, the following resolution was passed: "Be it resolved that there be entered upon the tax lists and duplicates for Hillsborough Township for the taxing year 1939 a total assessment of $21,953,125.00 (Twenty-one Million, nine hundred fifty-three thousand, one hundred twenty-five dollars), thus amending an assessment determined by this Board on November 18th, 1940, against Duke Power Company, a New Jersey corporation covering omitted 'cash' only, which total amount represents the true value of intangible personal property wholly omitted by the local assessor for Hillsborough Township, Somerset County, New Jersey, on the assessing date, October 1st, 1938." By no such method could it make "cash" out of things not such.

The prosecutor had no notice of the hearing. It contends that both notice of the complaint and of the hearing thereon were necessary under N. J. S. A. 54:3-20. A mere notice was sent advising it of the amended assessment couched in the following language: "You are hereby notified of the entry of an amended assessment of $21,953,125.00 against Duke Power Company, a New Jersey corporation covering *intangible* taxable assets of said corporation for the taxing year of 1939, in Hillsborough Township, Somerset County, New Jersey. A true copy of the resolution fixing the aforesaid assessment is herewith enclosed." This resolution is to be found above. It specifies nothing but advises that there is a tremendous tax to be paid, if valid. The subterfuge of the resolution to make intangibles "cash" was dropped.

Appendix A

The prosecutor later received the following notice: "Please take notice that the next meeting of Somerset County Board of Taxation will be held at the Court House in Somerville, New Jersey, at 10 A. M. on Monday, Secember 2nd, 1940."

In compliance therewith its counsel attended at the time specified and was told by the President of the Board: "We didn't ask you to be here. We simply notified you that we would have our regular meeting today and the reason for that was that if you desired to examine the records of the Board of that meeting (of Nov. 22, 1940) it was your privilege to do it."

A claim for exemption then presented was not allowed in evidence but was filed in the Board's records.

N. J. S. A. 54:3-20 provides a method for the inclusion of property omitted by the assessor and another method for the inclusion of property omitted from the assessment. Let us glance first at the procedure when property is omitted from the assessment. "On the written complaint of the collector, or any taxpayer of the taxing district or of the governing body thereof, that property specified has been omitted in the assessment, the county board, on *five days'* notice in writing to the owner by the party complaining, and after *due examination and hearing,* may enter the omitted property on the duplicate by *judgment rendered within ten days* after the hearing. * * * *Such proceeding may be brought within one year from the date when taxes on real property become a lien.*" The italics supplied.

There was no compliance whatever with the provisions of the law as we have seen. The notice was, in part, defective and there was no notice of the hearing when the question of the value of intangibles was determined, and no proceeding in a judicial manner as required by law. Duke Power

Co. v. Essex County Board of Taxation, 122 N. J. L. 589, aff. 124 Id. 41; followed in Porto Rican &c. v. Essex County Board of Taxation, 122 N. J. L. 595, aff. 124 Id. 134; Sun Oil Co. v. Essex County Board of Taxation, 122 N. J. L. 594, aff. 124 Id. 133.

The defendants contend that their proceedings were proper because it was under the first part of N. J. S. A. 54:3-20, which reads as follows: "The county board of taxation shall, by resolution, cause to be entered upon the tax duplicate a proper assessment against any property *omitted* by the assessor. The board shall then give immediate notice of such entry and of the time and place of its next meeting to the owner of the property affected, and furnish a copy of the entry to the clerk or collector of the taxing district, who shall enter it on his tax list."

There is a vast difference between the inclusion of property omitted by the assessor and property omitted from the assessment.

N. J. S. A. 54:4-55 provides: "The county board shall, on or before April first in each year, cause the corrected, revised and completed duplicates, certified by it to be a true record of the taxes assessed, to be delivered to the collectors of the various taxing districts in the county, and the tax lists shall remain in the office of the board as a public record." This limits action with respect to the property omitted by the assessor to April 1, 1939.

N. J. S. A. 54:4-47 provides: "The county board may adjourn from time to time in the discharge of its duties, and may, after investigation, revise, correct and equalize the assessed value of all property in the respective taxing districts, increase or decrease the assessed value of any property not truly valued, *add* to the lists and duplicates any property which has been omitted or overlooked, at its true

value, and in general do everything necessary for the taxation of all property in the county equally and at its true value."

But the time for this action finds a limitation in the following provision of law (N. J. S. A. 54:3-21): "A taxpayer feeling aggrieved by the assessed valuation of his property, or feeling that he is discriminated against by the assessed valuation of other property in the county, or a taxing district which may feel discriminated against by the assessed valuation of property in the taxing district, or by the assessed valuation of property in another taxing district in the county, *may on or before August fifteenth* appeal to the county board of taxation by filing with it a petition of appeal. A copy thereof shall also be filed with the clerk or attorney of the taxing district, setting forth the cause of complaint, the nature and location of the assessed property and the relief sought. The petition shall be signed and sworn to by the petitioner or his agent, and shall be in such form and contain such further information as may be from time to time prescribed by rule of the board, for the better understanding and determination of the appeal." This limits an appeal to a period closed August 15, 1939.

N. J. S. A. 54:3-26 provides: "The county board of taxation shall hear and determine all such appeals within three months after the last day for filing such appeals, and shall keep a record of its judgments thereon in permanent form, and shall transmit a memorandum of its judgment to the taxpayer, and in all cases where the amount of tax to be paid shall be changed as a result of an appeal, to the collector of the taxing district." This requires a determination before November 15, 1939.

That there must be some limit of time as to the settlement of tax controversies is apparent from the statute and the

cases. Kenilworth v. Board of Equalization, 78 N. J. L. 302; Acquackanonk Water Co. v. Passaic County Board, 88 Id. 555.

The county board could not, on its own motion, make the assessment on November 22, 1940 and then act as an appellate body on December 2, 1940. It was not acting according to law at either time. It might just as well have taken the figures for the assessment out of a news report.

The assessment was made on the complaint of an aggrieved taxpayer, and the procedural direction of the statute required a specific notice to the owner of the precise property claimed to be omitted from the assessment and a hearing upon notice and a deliberate judgment.

The underlying question in the case is the proper construction of the statute N. J. S. A. 54:3-20 and a determination as to whether there is a difference in the phraseology "property omitted by the assessor" and "property omitted in the assessment." Both phrases have occurred in our statutes since P. L. 1848, p. 230 was enacted. The first statute had two paragraphs. They were combined in substantially the present form in the Revision of 1903. If property in a taxing district is omitted by the assessor it must be added to the assessment before April 1st. Its addition decreases the amount of taxes to be raised since the ratables are thereby increased. The taxpayer is not embarrassed. He knows he will have a tax to pay and is liable anyway even if the property was not included in the assessment. However, if property is added to the assessment after the rate has been fixed it gives rise to a municipal windfall. There is no harm in this if there were due notice and a fair hearing by the county board and a judicial determination by it. The procedure adopted in this case was not in accordance with the statute. Property omitted by the assessor

must be added before April 1st, so that the rate of taxation may be determined. Thereafter, the addition of property omitted from the assessment must be in accordance with the part of the statute first quoted. Mitsch v. Riverside, 86 N. J. L. 603; Shillingsburg v. Greenwich, 83 Id. 129.

The duplicates, when delivered by the county boards under N. J. S. A. 54:4-55, must be certified by these boards "to be a true record of the taxes assessed." That means rates and amounts of taxes in addition to valuations. These rates and amounts of taxes are ascertained and fixed by the county boards under N. J. S. A. 54:4-48 and 54:4-49 upon reports made of needed funds for state, county and district purposes under N. J. S. A. 54:4-32, 54:4-39, 54:4-40 and 54:4-41, and they may be ascertained and fixed only by the county boards under the statute.

Even if the statute did not require notice and a hearing, when property omitted in the assessment is to be added, still common justice would require such a proceeding. Jersey City v. Board of Equalization, 74 N. J. L. 753.

However, under our statutes the property in question was exempt from taxation. "The personal property owned by citizens or corporations of this state, situate and being out of the state, upon which taxes shall have been actually assessed and paid within twelve months next before October first, being the day prescribed by law for commencing the assessment shall be exempt from taxation under this chapter." N. J. S. A. 54:4-3.2.

Personal property is defined in N. J. S. A. 1:1-2 as follows: "'Personal Property' includes goods and chattels, rights and credits, moneys and effects, evidences of debt, choses in action and all written instruments by which any right to, interest in, or lien or encumbrances upon, property or any debt or financial obligation is created, acknowl-

edged, evidenced, transferred, discharged or defeated, in whole or in part, and everything except real property as herein defined which may be the subject of ownership."

The question is one of fact. There is no doubt that all the property assessed was out of the state. The question is simply whether taxes were actually assessed and paid thereon within twelve months next before October 1 of the year in which the assessment should have been made.

The Machinery Act of North Carolina is Chapter 291 of the Public Laws 1937. It imposes a tax upon all property tangible and intangible within the state. The taxes raised are apportioned among the subdivisions of the state as taxes are apportioned under several of our taxing statutes imposing taxes upon public service corporations. The proofs show the assessment and payment of taxes in accordance with the act. The tax dates may vary somewhat, but for the twelve months prior to the assessment date there can be no doubt of the assessment and payment of taxes upon all the property included in the assessment here questioned.

The proofs clearly demonstrate that taxes had been assessed and been paid in North Carolina upon the property included in the assessment by the State Board. There was no basis for a conclusion that the property did not fall within the exempting statute. At all events, the only item included in the assessment when perhaps the proper procedure was complied with before the county board, i. e., "cash", was taxed in North Carolina so that the exemption statute of necessity applied.

Since none of the property in question was liable to taxation in Hillsborough Township, we need not consider the application of the remedial statutes N. J. S. A. 54:4-58 to 54:4-60. However, the remedial statutes we do not find to have been a substitute for proper assessment. Their appli-

cation has been only in instances where property has been omitted by the assessor or has been assessed in the name of one other than the true owner. Musconetcong Iron Works v. Borough of Netcong, 90 N. J. L. 58; Manistee Iron Works v. Raritan, 12 N. J. Misc. 143. But they do not apply where the statute for the addition of property omitted from the assessment is not complied with. Mitsch v. Riverside, 86 N. J. L. 603; Shillingsburg v. Greenwich, 83 Id. 129.

Since the property assessed was not subject to taxation and since the procedure before the State Board was no substitute for a proper proceeding before the County Board, the assessment is set aside and the judgment is reversed.

APPENDIX B

CASES AT LAW

Determined in the

COURT OF ERRORS AND APPEALS

of the

STATE OF NEW JERSEY

March Term, 1919.

(93 N. J. Law, 127.)

Helen Garland, Respondent v. The Furst Store, A corporation, appellant.

Argued November 26, 1918—Decided May 8, 1919.

1. Where liability is made to depend at all upon notice to a party, the adversary party must establish the notice before the other is called upon to contest it.

2. A mere fall of a person on the premises of another without any evidence to show how the fall was occasioned, raises no presumption of negligence on the part of the owner, and the doctrine of *res ipsa loquitur*, which is only applicable when the thing shown speaks of the negligence of the defendant, not merely of the happening of the accident, does not apply.

3. Whether a jury is ordered by the court to inspect or examine premises as an aid in ascertaining the truth of any matter in dispute between the parties to an action under the Evidence act (*Comp. Stat., p.* 2229, § 30), or to view any place to enable the jury better to understand the evidence given in the cause under the Jury act (*Comp. Stat., p.* 2976, §§ 31, 35), the judgment rendered

by the jury should, nevertheless, be reversed if legally unsupportable in and by the record under review, as the questions presented to an appellate court should be decided upon what appears in the record brought up from the court below, notwithstanding a view was had by the jury which tried the cause.

On appeal from the Supreme Court.

For the appellant, *Runyon & Autenreith* and *Walter L. McDermott.*

For the respondent, *Doherty & Kinkead* and *Richard Doherty.*

The opinion of the court was delivered by

Walker, Chancellor. This is an action at law for alleged negligence resulting in personal injuries. It was tried before Judge Cutler and a jury in the Hudson Circuit Court, and upon the trial, on motion of the appellant, the jury were permitted to view the scene of the accident. Motions to nonsuit and to direct a verdict were denied, the jury rendered a verdict for the plaintiff, and upon appeal to the Supreme Court the judgment was affirmed. From the judgment entered upon that affirmance an appeal has been taken to this court.

* * * * * * * * *

The mere fact that Mrs. Garland fell on the floor of the Furst store, without any evidence to show how the fall was occasioned, raises no presumption of negligence on the part of the owner, and the doctrine of *res ipsa loquitur,* which is only applicable when the thing shown speaks of the negligence of the defendant, not merely of the happening of the accident, does not apply. As the majority of this court said

in *Cronecker* v. *Hall*, 92 *N. J. L.* 450 (at p. 452), that there was no testimony worthy of the designation from which it could be inferred that what the defendant's agent did was done in the scope of his master's business; so, here, it can as pertinently be remarked that there is no testimony worthy of the name which shows that the defendant was negligent.

In our opinion a nonsuit, and failing that, a direction of a verdict for the defendant should have been ordered at the trial.

But the defendant-respondent contends that as there was a jury of view the observations of the jurymen are evidence in the case, and, as a court of appeal cannot know what they saw, the verdict of the jury may not be set aside.

The Supreme Court in its opinion stated that it was argued for appellant, and with much force, that the floor was of standard material, in general use for the purpose, and that there was no evidence of any lack of ordinary care in using and maintaining it, but the difficulty about adopting that line of reasoning was that the jury went to examine the floor, at the instance of the defendant's counsel, who asserted that it was in the same condition at the time of trial as it was in when plaintiff sustained her injury; that the jury came back and returned a verdict for the plaintiff; that what they saw or felt, or both, did not appear in the printed case, and the court could not tell but that their observation disclosed a condition which, if referred back to the time of the accident, was persuasive of negligence on the defendant's part.

This was, in effect, a ruling that what the jury saw amounted to mute evidence tending to establish defendant's negligence, and for that reason, in addition to the other one given, namely, that there was evidence of an unusually slippery floor, stated *arguendo*, the judgment was affirmed, ap-

parently upon the theory that because the extent to which the view afforded evidence could not be known, the verdict could not be overridden even if the proofs to be found in the record were not in and of themselves sufficient to sustain the jury's finding. This we deem to be error. In our opinion, for reasons to be presently stated, a judgment should be reversed if legally unsupportable in and by the record under review, notwithstanding a view of the premises by the jury.

The respondent urges that the view by the jury was had under section 30 of the Evidence act. *Comp. Stat., p.* 2229. It is true that section 30 provides that in case it shall appear that an inspection or examination of any premises would aid in ascertaining the truth of any matter in dispute between the parties to an action, it shall be lawful for the court to order an inspection or examination of the premises by the jury or the opposite party or parties or such persons as shall be named as witnesses, which inspection or examination may be ordered either before or during the progress of the trial. This is not the jury of view statute, strictly so called. That is to be found in the Jury Act. *Comp. Stat. p.* 2976, §§ 31, 35.

The inspection or examination by the jury under section 30 of the Evidence act is not accompanied with showers, as is the case under section 31 of the Jury act. That act, in section 35, provides that the court may at any time after the jury is drawn, order that the jury shall view any place, if, in the judgment of the court, such view is necessary to enable the jury better to understand the evidence given in the cause, and such view shall thereupon be had in such manner as the court shall direct. The motion in this case was for the appointment of a jury of view rather than one of inspection or examination; assuming there is any substantial difference between them. Counsel for the defendant-appellant moved

for permission to have the jury go and look at the floor, and the trial judge ruled that he would allow the jury to go under the care of an officer to view the premises, and that each side might select a man, a shower, of course, although that was not stated. Obviously, if the court ordered an inspection or examination by a party or witness under the Evidence act, either could give testimony before the jury as to what they saw; but if the jury made the inspection or examination, what they saw might aid in ascertaining the truth. That would be no more than enabling the jury better to understand the evidence by a view under the Jury act. It is quite impossible to believe that the legislature intended to place upon the statute books two schemes with reference to views by juries, one in which what they saw should be substantive evidence and the other not.

In the view we take of this question, it is unnecessary to decide to what extent an inspection or examination of premises under section 30 of the Evidence act, or view of the premises under sections 31 and 35 of the Jury act, may or may not be evidential, for, in no event, could either be conclusive and thus prevent the court from controlling the issue as matter of law.

The defendant-appellant cites two cases in this state on the question of view—*Gaunt* v. *State*, 50 *N. J. L.* 490, and *De Gray* v. *New York and New Jersey Tel. Co.*, 68 *Id.* 455. Gaunt *v.* State is, if anything, against his position. It was there held that upon the trial of an indictment for fornication, where the bastard and the putative father were viewed by the jury, the jury might consider whether there was a resemblance or not between them, and that in such cases the proper instrument of proof is inspection by the jury and not the testimony of witnesses—that is, resemblance between the child and the putative father. But this case is not an au-

thority, to the effect that a judgment may not be reversed, because there has been a view by the jury. Mr. Justice Garrison, who wrote the opinion, concludes with the assertion that the child was in court during the trial and the attention of the jury was directed to it, that the defendant was a witness, and that in those circumstances it was not error for the court to refuse to charge the jury that they must not consider the question of resemblance at all, and that if they did consider it, it must be from the testimony from the mouths of witnesses and not from their own view. Thus it appears that the only question decided was, that it was not error for the trial judge to refuse to charge that the jury must not consider the question of resemblance, and if they did, it must be from the testimony of witnesses and not from their own view. The case therefore, is not an authority on the precise question under discussion in the case at bar. Nor is De Gray *v.* New York and New Jersey Tel. Co. That was a trial of an appeal from an award of commissioners who assessed land in condemnation proceedings. The trial judge charged, among other things, that the jury might adopt the opinions of witnesses so far as reasonable, and had the right to take into consideration their own experience as to whether certain structures were detrimental to the market value of abutting property, and if, in their experience, they were, the jury would make the compensation accordingly, and if they were not, and the jury were not inclined to adopt the views that had been expressed to the contrary, their award would be proportionally less. This was held to be errror for several reasons, among which was, that to avail a party of a fact known to a juror he must be sworn and examined as any other witness, so that his evidence, like that of any other witness, may be first scrutinized as to its competence and bearing upon the issue, and for the further reason that the

court and parties may know upon what evidence the verdict was rendered. Under this charge the jurors were permitted to arrive at a verdict upon their personal knowledge or experience, and to be, in effect, witnesses before their co-jurors. This does not touch the question of the evidential effect of an inspection or view of given premises, or whether or not in a case where an inspection or view is had the verdict may not be set aside as against the weight of the evidence or because there was no legal evidence given on the trial which would support it.

The question being an open one in this state we are at liberty to adopt that principle which we think more consonant with reason and better calculated to serve the ends of justice.

In *Seaverns* v. *Lischinski*, 181 *Ill.* 358, Chief Justice Cartwright observed that it had never been held in Illinois that a jury might return a verdict upon their own knowledge unsupported by other evidence, whether such knowledge was acquired in or out of court by a view or otherwise, and a verdict based exclusively on knowledge so acquired would be set aside for want of substantial evidence to support it; that a verdict unsupported by sworn testimony upon disputed facts has always been successfully challenged, whether there was a view or not, and if a jury had disregarded such evidence, or there was none which a reasonable person might believe and act upon, the verdict should be set aside; that in the very nature of things it is ordinarily impossible to put in the bill of exceptions persons, places or things exhibited to a jury; that the sense in which a bill of exceptions is understood is, that the bill contains all the evidence if it contains that which was presented at the trial, although objects, persons or scenes, of which the jury may have had a view, are not contained in it; that cases where a view has been permitted which the jury might consider in arriving

at their verdict, either as evidence or to enable them to construe and apply the testimony, stand on a somewhat different footing than where there has been no such view, and a verdict cannot be based alone upon seeing a rope or a building or the evidence of the senses.

In the case of *People* v. *Thorn*, 156 *N. Y.* 286, a criminal case, the New York Court of Appeals observed that if the view were a part of the trial, or was the taking of testimony upon the trial, it may be that the view could not take place in the absence of the defendant; but they were not prepared to concede that the view was a part of the trial or was the taking of evidence. The trial could not take place in the absence of the judge, jury and defendant, and yet the provision of the code did not require the judge to attend upon the jury during the time it was inspecting the premises; that it was doubtless true that jurors might draw inferences from the objects which came under their vision; that if viewing the locality during the trial were the taking of testimony, why was not the seeing of the locality before the trial the taking of testimony? That if seeing were the taking of evidence, it would follow in every case that a juror who had seen, and was familiar with, the locality, would be incompetent to sit as a juror, for he would have taken testimony in the absence of the accused, with which he had never been confronted.

In that case the view was had under a provision in the New York code of criminal procedure, which, however, contains no peculiar feature distinguishing the view in those cases from one had in a civil cause. The case is a particularly strong one against the theory that a view by a jury constitutes the taking of evidence, because in that, a murder case, the defendant and his counsel were absent. It is true that defendant's counsel requested the view and waived

the right of the defendant and himself to be present; but, after conviction of murder in the first degree, it was contended on behalf of the defendant, that the inspection was part of the trial and the taking of evidence, which could only be done in the presence of the defendant in a capital case, and that his waiver was void. It was held otherwise on the ground that the view was not a part of the trial and was not the taking of testimony.

It should be noted that the inspection or examination under section 30 of our Evidence act is to be ordered when it shall appear that such a proceeding would *aid in ascertaining the truth of any matter in dispute between the parties to an action,* not that it should be conclusive of anything or even evidence in and of itself. And the same is to be remarked of a view under sections 31 and 35 of the Jury act, where, by section 35, it is provided that the court may order that *the jury shall view any place if such view is necessary to enable the jury better to understand the evidence given in the cause.*

In our opinion the question presented to a court of review should be decided upon what appears in the record brought up to the appellate tribunal, notwithstanding that a view was had by the jury.

The judgment of the Supreme Court must be reversed, to the end that a *venire de novo* may issue.

APPENDIX C

NEW JERSEY MISCELLANEOUS REPORTS,
Vol. 11. 243.—

Supreme Court—Rich v. Inter-City Transportation Co.

HARRY RICH, PLAINTIFF-RESPONDENT, v. INTER-CITY TRANSPORTATION COMPANY, DEFENDANT-APPELLANT.

Submitted October 14, 1932—Decided March 25, 1933.

A judge, sitting without a jury, is not entitled to base a finding of fact upon any knowledge he may have, but he must confine himself to the evidence offered; he can only take judicial notice of facts generally known to all persons.

On appeal from the Passaic District Court.

Before Justices TRENCHARD and CASE.

For the plaintiff-respondent, *Dominick Marconi.*

For the defendant-appellant, *William V. Rosenkrans.*

PER CURIAM.

This action arises out of a collision between plaintiff's automobile and defendant's bus at a street intersection in the borough of Rutherford. The judge, sitting without a jury, rendered judgment for the plaintiff.

Of the several points sought to be made by the defendant on its appeal we find substance in none except the second, which is that the court erred in reaching a conclusion based on a factual finding not supported by the evidence. The questioned part of the court's finding is as follows:

"I don't think the bus driver could see the light at any point after he had passed the point on a line with the bench, unless he stooped low, because the court is familiar with the

construction of the bus and knows the sun visor that they have on, and at this particular location, where the bus is coming down hill, I don't think that he could see that light at any time after he passed Raymond avenue, unless he stooped low to look up. The court will therefore find in favor of the plaintiff for $500."

The assumed knowledge upon which the court relied in thus discarding the relevant and material testimony of the bus driver was not obtained from the evidence. Plaintiff's contention on the point is that the defendant becomes "frivolous when it argues that the judge cannot use, in arriving at his decision, knowledge general to persons in the locality where the collision occurred and where the trial was had, because the judge should have first been sworn as a witness to be allowed to use such knowledge." We think that the defendant's argument is not frivolous. It is not apparent that the knowledge was general to persons in the locality or elsewhere. It would indeed be difficult for a party litigant to prepare or to conduct his case if the issue could be disposed of an [on] adverse factual conceptions resting silently in the court's mind and arising entirely outside the walls of the court room. Against such a situation the party, because ignorant of its existence, is powerless to combat. The common law oath to a juror "well and truly to try the issue between the parties and a true verdict to give *according to the evidence*" (see 3 *Blacks. Com.* 365) is closely followed in the present statutory oath to a District Court juror that he "will well and truly try the matter in difference • • • and a true verdict give according to the evidence" (An act concerning District Courts—Revision of 1898—section 157, *Pamph. L.* 1898, *p.* 615).

Appendix C

The judge was sitting without a jury, but we know of no latitude that permitted him to reach a judgment except according to the evidence. Courts may take judicial notice of facts that may be regarded as forming part of the common knowledge of every person of ordinary understanding and intelligence, and jurors may exercise their knowledge of human nature in determining the truthfulness or untruthfulness of a witness; but the present instance is not one of such.

Even where a view of premises, under legislative or judicial authority, has been had by a jury the Court of Errors and Appeals has held that the appeal should be decided upon what appears in the record (*Garland* v. *Furst Store*, 93 *N. J. L.* 127, 137; 107 *Atl. Rep.* 38), and that the mental impressions received by a jury under such circumstances are not to be taken as evidence adduced in court. *State Highway Commission* v. *Lincoln Terminal Corp.* (*Court of Errors and Appeals*), 110 *N. J. L.* 190; 164 *Atl. Rep.* 476.

The pivotal fact question in the instant case was what colors were shown by the traffic light as the vehicles of the respective parties entered upon the street intersection. The defendant's driver had testified that as he entered upon the intersection the light from his direction was green. We think that the court erred in basing its disbelief of that testimony upon the physical arrangement of the sun visor on the defendant's bus in relation to the grade of the highway and the position of the light—conditions that were not disclosed by the evidence and concerning which the court assumed to have knowledge from sources foreign to the case.

The judgment below will be reversed and a *venire de novo* will issue, costs to abide the event.